Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

JOHN CHARLES SUTHERLAND,

Petitioner,

v.

CITY OF BIRMINGHAM,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

APPENDIX

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Supreme Court of Alabama.

CITY OF BIRMINGHAM
v.
John Charles SUTHERLAND.
John Charles Sutherland
v.
City of Birmingham.

1001327 and 1001458.

March 29, 2002.

Bank patron brought action against city, alleging negligence, false imprisonment, defamation, and assault and battery, in connection with his arrest at bank by a city police officer for allegedly passing counterfeit checks. The Jefferson Circuit Court, No. CV-98-7553, entered judgment as a matter of law for city as to all claims except negligence and assault and battery and entered judgment on jury verdict for patron, awarding $65,000 in damages. City appealed, and patron cross-appealed. The Supreme Court, Harwood, J., held that officer had probable cause to make a warrantless arrest of bank patron for a felony, and thus was performing a discretionary function, such that city was entitled to discretionary-function immunity

from liability.

Affirmed in part and reversed and remanded in part.

HARWOOD, Justice.

*1 The City of Birmingham (hereinafter referred to as "the City") appeals the trial court's denial of its preverdict and postverdict motions for judgments as a matter of law as to certain claims that had been asserted against it by John Charles Sutherland. Sutherland cross-appeals the trial court's judgment as a matter of law in favor of the City on other claims that he asserted. We reverse and remand as to the City's appeal and affirm as to Sutherland's cross-appeal.

On December 22, 1998, Sutherland sued the City, seeking to recover damages on claims of false imprisonment, "public ridicule" and defamation, and assault and battery arising from a June 27, 1997, incident at a Colonial Bank (hereinafter referred to as "the bank") located in Birmingham, in which Sutherland was accused by the bank's manager, Mark Renda, of passing two counterfeit checks. After an initial confrontation with Renda, Sutherland left the bank; he returned soon thereafter to discuss the accusation with Renda. When Sutherland returned, Renda

was reporting to the University of Alabama at Birmingham ("UAB") Police Department, by telephone, his suspicion that Sutherland had passed counterfeit checks. The UAB Police Department then sent a radio dispatch to the Birmingham Police Department stating that there was a forgery suspect at the bank.

A "plain-clothes" police officer, Michael Wooten, was the first officer to arrive at the bank. When he arrived, Renda was still in his office and Sutherland was standing outside the office. Officer Wooten went to Renda's office, and Renda identified Sutherland as the suspect. Officer Wooten then arrested Sutherland by drawing his handgun, pointing it at Sutherland, and instructing him not to move. When additional officers arrived, Sutherland was handcuffed and seated in the bank lobby. He was later taken to the Birmingham Police administration building, where he was questioned and released within an hour; no charges were ever filed against him as a result of the arrest.

On January 20, 1999, the City filed an answer that asserted numerous defenses to Sutherland's complaint, including immunity under §§ 6-5-338 and 11-47-190, Ala.Code 1975. The City also asserted that there was no basis for liability on its part because, it argued, Wooten had probable cause to arrest Sutherland. Following

discovery and court-ordered mediation, the City filed a motion for a summary judgment on August 11, 2000, with a supporting brief and exhibits. On August 29, 2000, Sutherland filed a response and a memorandum in opposition to the City's motion for a summary judgment, with attached exhibits. On October 31, 2000, the trial court entered an order on its case action summary that stated, in pertinent part:

> "The City['s] ... motion for summary judgment is granted as to all claims except those set out in *Alabama Code* Section 11-47-190 for neglect, carelessness or unskillfulness. Section 6-5-338, supra, establishes immunity for (a) police officers and (b) their governmental unit for discretionary functions. Insufficient facts are before the Court to establish discretionary immunity. While [Sutherland's] case may be subject to a judgment as a matter of law, [the City's] motion for summary judgment is overruled as to negligence claims."

*2 On November 6, 2000, the City filed a motion requesting that the trial court reconsider its motion for a summary judgment; on January 8, 2001, it filed what it termed a "supplemental reply" to its motion to reconsider. On January 17, 2001, the City filed a motion to stay the trial of the case, which was set for January 22, 2001, to await a ruling by this Court on a writ of

mandamus the City had also filed on January 17, 2001, in regard to the trial court's denial of a summary judgment to the City on all of Sutherland's claims. On January 22, 2001, this Court entered an order denying the City's petition for writ of mandamus.

The trial of the case began on January 22, 2001. At the close of Sutherland's case-in-chief, the City filed a motion for a judgment as a matter of law; the trial court denied that motion. The trial transcript shows that the City again made a motion for a judgment as a matter of law at the close of all evidence, and the trial judge granted it as to Sutherland's false-imprisonment claim, stating, in pertinent part:

> "The Court is going to find as a matter of law that ... Officer Wooten had probable cause and acted within his authority to make the arrest; therefore, the temporary detention was also justified. I find as a matter of law and a matter of fact that you can do something legally but do it in an illegal way.
>
> "So I find that they can proceed to the jury on negligence, assault and battery, and the subpart, excessive use of force, which is part of that assault and battery."

On January 25, 2001, the jury returned a verdict for Sutherland in the amount of $115,000. Those damages were reduced by $50,000, the amount of a pro tanto

settlement paid by Colonial Bank and Renda. (See footnote one of this opinion.) On February 23, 2001, the trial court entered a judgment against the City in the amount of $65,000. On that same day, the City filed a renewed motion for a judgment as a matter of law, or in the alternative, a motion to vacate the
verdict, or a motion for a new trial; on March 9, 2001, the City amended its postjudgment motions to include additional grounds supporting its argument that it was entitled to a judgment as a matter of law based on the defenses of probable cause and discretionary immunity, and to include additional grounds supporting its argument that it was entitled to a new trial. On March 27, 2001, the trial court denied the City's renewed motion for a judgment as a matter of law and other postjudgment motions. On April 23, 2001, the City filed a notice of appeal; Sutherland filed a notice of cross-appeal on May 7, 2001.

In its appeal, the City argues that the trial court erred by not entering a summary judgment for it on all claims and by not granting its preverdict or postverdict motions for a judgment as a matter of law, on the grounds (1) that § 6-5-338, Ala.Code 1975, provides immunity to the City for what, it says, was Officer Wooten's exercise of a discretionary function; (2) that § 11-47-190, Ala.Code 1975, provides the City

substantive immunity because, it says, Officer Wooten did not act negligently; (3) that the defense of probable cause is a defense to its liability, citing *Couch v. Sheffield*, 708 So.2d 144 (Ala.1998); and (4) that *Couch v. Sheffield, supra*, provides the City with immunity against the intentional acts of Officer Wooten that constitute willful or malicious conduct or acts taken in bad faith.

*3 Sutherland cross-appeals the trial court's judgment as a matter of law for the City on his claim of false imprisonment. Sutherland argues that the trial court erred because, he says, the evidence concerning Officer Wooten's actions in making the arrest was in dispute.

[1] Our review of the trial court's rulings on the City's preverdict and postverdict motions for a judgment as a matter of law is dispositive of this case. See *Superskate, Inc. v. Nolen*, 641 So.2d 231, 233 (Ala.1994)("Ordinarily, any issue as to the denial of [a] summary judgment motion would be moot, because the sufficiency of the evidence at trial would be the significant question on appeal."). Our review of the grant or denial of a motion for a judgment as a matter of law is governed by the following standard:

" 'The standard of review applicable to a motion for directed verdict or judgment notwithstanding the verdict [now referred to as preverdict and postverdict

motions for a judgment as a matter of law] is identical to the standard used by the trial court in granting or denying the motions initially. Thus, when reviewing the trial court's ruling on either motion, we determine whether there was sufficient evidence to produce a conflict warranting jury consideration. And, like the trial court, we must view any evidence most favorably to the non-movant.' "

Glenlakes Realty Co. v. Norwood, 721 So.2d 174, 177 (Ala.1998) (quoting *Bussey v. John Deere Co.*, 531 So.2d 860, 863 (Ala.1988)).

The City first argues that § 6-5-338, Ala.Code 1975, provides it immunity for what, it says, was Officer Wooten's exercise of a discretionary function in arresting Sutherland. Section 6-5-338 states, in pertinent part:

"(a) Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state, whether appointed or employed as such peace officer by the state or a county or municipality thereof, or by an agency or institution, corporate or otherwise, created pursuant to the Constitution or laws of this state and authorized by the Constitution or laws to appoint or employ police officers or other peace officers, and whose duties prescribed by law, or by the lawful terms of their employment or appointment, include the enforcement of,

or the investigation and reporting of violations of, the criminal laws of this state, and *who is empowered by the laws of this state* to execute warrants, *to arrest* and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such *shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.*

"(b) This section is intended to extend immunity only to peace officers *and governmental units or agencies authorized to appoint peace officers.* No immunity is extended hereby to any private non-governmental person or entity, including any private employer of a peace officer during that officer's off- duty hours."

*4 (Emphasis added.) This Court has stated that "subsection (b) makes it clear that this immunity is extended to 'governmental units or agencies authorized to appoint [law-enforcement] officers.' " *Telfare v. City of Huntsville*, [Ms. 1000357, January 18, 2002] — So.2d —, — (Ala.2002).

In *Telfare, supra*, this Court further observed:

"In *Ex parte City of Gadsden*, 781 So.2d 936 (Ala.2000), we squarely addressed the

issue of a municipality's liability for a police officer's conduct. In *Ex parte City of Gadsden* we stated: '[W]e must first determine whether [the officer] was engaged in performing a discretionary function.' 781 So.2d at 938. Discretionary functions are those which 'there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice involving what is just and proper under the circumstances.' *Wright v. Wynn*, 682 So.2d 1, 2 (Ala.1996). Generally, arrests and attempted arrests are classified as discretionary functions.

" 'A State agent *shall* be immune from civil liability in his or her capacity when the conduct made the basis of the claim against the agent is based upon the agent's

" '....

" '(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, *law-enforcement officers' arresting or attempting to arrest persons* ....'

"*Ex parte Cranman*, 792 So.2d 392, 405 (Ala.2000)(second emphasis added)."

--- So.2d at ----. "This Court has also held, however, that acts taken in bad faith, or willful or malicious conduct, will not be considered discretionary in nature." *Ex parte City of Montgomery*, 758 So.2d 565, 569 (Ala.1999)(citing *Couch v. City of Sheffield*, 708 So.2d 144, 153 (Ala.1998); see *Wright v.*

Wynn, 682 So.2d 1 (Ala.1996); *Barnes v. Dale*, 530 So.2d 770 (Ala.1988); *DeStafney v. University of Alabama*, 413 So.2d 391 (Ala.1981)).

As a law-enforcement officer, Officer Wooten's power to arrest is governed by the laws of this State. This power is recognized in § 6-5-338(a), and the laws of this State provide reasonably well-defined rules governing when an officer may make a warrantless arrest--such as Officer Wooten's arrest of Sutherland. Rule 4.1(a), Ala. R.Crim. P., and § 15-10-3, Ala.Code 1975, provide the limited circumstances under which an officer may make a warrantless arrest. Rule 4.1(a) states:

"(a) Arrest by a Law Enforcement Officer.

"(1) A law enforcement officer *may* arrest a person without a warrant if:

"(i) The law enforcement officer has probable cause to believe that *a felony* has been committed, or is being committed, and that the person to be arrested committed it, or

"(ii) Any offense has been committed *in the law enforcement officer's presence or view*, or

"(iii) The arrest is otherwise authorized by statute, such as Ala.Code 1975, § § 32-5-171, 32-5A-191, 15-10-3.

*5 "(2) The law enforcement officer shall inform the person arrested of the officer's authority and the cause of the arrest, except when the person is arrested in the

actual commission of the offense or during pursuit immediately thereafter." (Emphasis added.) Similarly, § 15-10-3(a), Ala.Code 1975, states:

"(a) An officer *may* arrest a person without a warrant, on any day and at any time in any of the following instances:

"(1) If a public offense has been committed or a breach of the peace threatened *in the presence of the officer.*

"(2) When *a felony* has been committed, though not in the presence of the officer, by the person arrested.

"(3) When *a felony* has been committed and the officer has reasonable cause to believe that the person arrested committed the felony.

"(4) When the officer has reasonable cause to believe that the person arrested has committed *a felony,* although it may afterwards appear that a felony had not in fact been committed.

"(5) When a charge has been made, upon reasonable cause, that the person arrested has committed *a felony.*

"(6) When the officer has actual knowledge that a warrant for the person's arrest for the commission of a felony or misdemeanor has been issued, provided the warrant was issued in accordance with this chapter. However, upon request the officer shall show the warrant to the arrested person as soon as possible. If the officer does not have the warrant in his or her possession at the time of arrest the

officer shall inform the defendant of the offense charged and of the fact that a warrant has been issued.

"(7) When the officer has reasonable cause to believe that a felony or misdemeanor has been committed by the person arrested in violation of a protection order issued by a court of competent jurisdiction.

"(8) When an offense involves domestic violence as defined by this section, and the arrest is based on probable cause, regardless of whether the offense is a felony or a misdemeanor."

(Emphasis added.)

[2] We, therefore, apply these rules to our initial determination of whether Officer Wooten had the discretion to make a warrantless arrest of Sutherland. We note that these rules do not afford an opportunity to exercise discretion under certain circumstances (i.e., no probable cause to believe that a felony has been committed and that the person arrested committed it, or if no offense has been committed in the officer's presence). If the initial criteria for making a warrantless arrest were satisfied in this case, we would conclude that Officer Wooten's choices as to whether to make a warrantless arrest, and how to effect that arrest, represent discretionary functions. Accordingly, we consider whether Officer Wooten had probable cause to make a warrantless arrest

they had cut it off, when you picked it up from me, didn't the tape start out saying they want some more information?

"A. Just now, it started out they were asking for further description information.

"Q. Further information. And people started talking about forgery; right?

"A. Yes, sir.

"Q. Felony; correct?

"A. Yes, sir.

"Q. And you contacted the City of Birmingham; correct?

"A. Yes, sir.

"Q. To the best of your knowledge, we went there; correct?

"A. Yes, sir."

Officer Wooten further testified as follows at trial, after a recording of the dispatch tape had been played:

"Q. Officer Wooten, were you in car 346 that day?

"A. Yes, sir, that was my number.

"Q. And that was your voice on that tape?

"A. Yes.

"Q. And did you hear on your dispatch 'Suspects at Colonial Bank suspected of a forgery ring.'

*7 "A. Yes, sir.

"Q. And you responded to that?

"A. Yes, sir.

"Q. Did you believe that was a felony?

"A. Yes, sir.

"Q. And you were responding to that felony?

and circumstances within their (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been committed...." (Citations omitted)

" 'In determining whether there is probable cause to arrest, it is not necessary that the officer have before him evidence that would support a conviction for the offense. He need only have facts and circumstances within his knowledge which are reasonably trustworthy and which would lead a prudent man to believe that the accused committed or was committing an offense.' "

418 So.2d at 220 (quoting *Tice v. State*, 386 So.2d 1180, 1183 (Ala.Crim.App.1980)). See also *Ex parte City of Montgomery*, 758 So.2d at 570.

The record in this case shows that Officer Wooten went to the bank as a result of a dispatch sent out by the UAB Police Department. At trial, Rose Marie Sanders, the communications supervisor at the UAB Police Department who was the custodian of the department's radio logs and audio tapes, testified as follows concerning the dispatch sent out to the Birmingham Police Department to which Officer Wooten was responding when he arrived at the bank:

"Q. When you picked up the tape for the ladies and gentlemen of the jury, after

of Sutherland.

Section 15-10-3(a) provides guidance in determining whether Officer Wooten had probable cause to arrest Sutherland. We note that our consideration of probable cause is also critical to Sutherland's cross-appeal, because the trial court's finding that Officer Wooten had probable cause for the arrest was the basis of its judgment as a matter of law for the City on Sutherland's claim of false imprisonment. Therefore, we will address both the discretionary-immunity subpart of the City's argument on appeal and Sutherland's cross-appeal.

*6 The Court of Criminal Appeals, in *Owen v. State*, 418 So.2d 214 (Ala.Crim.App.1982), equated the term "probable cause" with "reasonable cause," as that latter term is used in § 15-10-3. In *Owen*, the Court of Criminal Appeals observed:

" 'An officer may arrest without a warrant when "a felony has been committed and he has reasonable cause to believe that the person arrested committed it." Section 15-10-3, Code of Alabama 1975. The rule of reasonable or probable cause is a "practical, nontechnical conception." *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949). As defined in *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959):

" ' "Probable cause exists where 'the facts

"A. Yes, sir."

Renda, the manager of the bank, also testified at one point that Officer Wooten, when he arrived at Renda's office, identified himself to Renda as a police officer, but later testified that Officer Wooten did not identify himself as a police officer, but that Renda assumed he was. In any event, it is undisputed that Renda then identified Sutherland to Officer Wooten as the suspect.

[3] Under these circumstances, we conclude that Officer Wooten had probable cause to believe that a felony had been committed and that Sutherland had committed it. [FN1] Thus, he was performing a discretionary function when he chose to make a warrantless arrest and a discretionary function when he chose the manner in which he would effect the arrest. *Cranman, supra.* Sutherland further failed to specifically allege, or to present any evidence tending to prove, that Officer Wooten's actions were taken in bad faith, or that his conduct was willful or malicious. The gist of the allegations made by Sutherland was that Officer Wooten negligently had exceeded his authority in effecting the arrest. Allegations of negligence are not sufficient to remove the immunity the City is provided for Officer Wooten's performance of a discretionary function. *City of Montgomery, supra.*

Thus, the trial court erred in not finding that the City had discretionary- function immunity, i.e., immunity from tort liability arising out of Officer Wooten's conduct in the performance of a discretionary function within the line and scope of his law-enforcement duties in accordance with § 6-5-338, Ala.Code 1975, as a matter of law. The judgment of the trial court is therefore reversed, and the cause is remanded for the trial court to enter a judgment as a matter of law for the City on Sutherland's negligence and assault-and-battery claims. As to Sutherland's cross-appeal, we affirm the trial court's judgment as a matter of law for the City on Sutherland's false-imprisonment claim based on its finding, supported by the record, that Officer Wooten had probable cause to arrest Sutherland.

1001327--REVERSED AND REMANDED.

1001458--AFFIRMED.

MOORE, C.J., and SEE, BROWN, and STUART, JJ., concur.

FN1. Under § 13A-9-3, Ala.Code 1975, passing a counterfeit check constitutes the crime of forgery in the second degree. Section 13A-9-3 states, in pertinent part:

"(a) A person commits the crime of forgery in the second degree if, with intent to defraud, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

"(1) A deed, will, codicil, contract, assignment or a *check*, draft, note or other commercial instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; ...

"....

"(b) Forgery in the second degree is a *Class C felony*."

(Emphasis added.)

IN THE SUPREME COURT OF ALABAMA

May 17, 2002

1001458

John Charles Sutherland v. City of Birmingham (Appeal from Jefferson Circuit Court: CV-98-7553),

ORDER

The application for rehearing filed in this cause is overruled,

Overruled - No Opinion

HARWOOD, J. - Moore, C.J., and See, Brown, and Stuart, JJ., concur.

I Robert Q. Esdate, St. as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the Instrument(s) herewith set out as same appear(s) of record in said Court
Witness my hand this 17th day of May 2002.

s/_____
Clerk,. Supreme Court of Alabama
/rb

JOHN CHARLES SUTHERLAND VS. COLONIAL BANK, ET AL CV 98 - 7553

Date	ACTIONS, JUDGMENTS, CASE NOTES	356
1/14/00	The Plaintiff, John Charles Sutherland, and the Defendant, Colonial Bank, filed a joint motion to compel mediation. The other Defendant, The City of Birmingham, objected on the basis that it had no liability. Pursuant to Section 6-6-20, Code of Alabama, mediation is ordered by separate paper. The costs of such mediation shall be paid pursuant to Section 6-6-20(b)(2), Code of Alabama. Rule 13, A.R.C.M. is subject to said Section 6-6-20. The trial date remains on November 6, 2000. DONE AND ORDERED on this the 14th day of August, 2000. , Circuit Judge cc: Linda L. Cole, Esquire George M. Neal, Jr., Esquire James D. Love, Esquire	
9/7/00	Consent Stipulation For Pro Tanto Dismissal With Prejudice	
9/8/00	Pro Tanto Order of Dismissal as per separate paper. Each party to bear its own costs. Claims against the remaining defendant, the City of Birmingham remain pending. DONE AND ORDERED on this the 8th day of September, 2000. , Circuit Judge cc: Linda L. Cole, Esquire George M. Neal, Jr., Esquire James D. Love, Esquire	
8-11-00	Def's Cat B - Motion for SJ	
8-11-00	Def's Cat B - Brief	
8-14-00	Ord - Mediation per sep paper/ JDL	
10/31/00	The City of Birmingham ("Birmingham")'s motion for summary judgment is granted as to all claims except those set out in Alabama Code Section 11-47-190 for neglect, carelessness or unskillfulness. Section 6-5-338, supra, establishes immunity for (a) police officers and (b) their governmental unit for discretionary functions. Insufficient facts are before the Court to establish discretionary immunity. While the Plaintiff's case may be subject to a judgment as a matter of law, Birmingham's motion for summary judgment is overruled as to negligence claims. DONE AND ORDERED on this the 31st day of October, 2000. , Circuit Judge cc: Linda L. Cole, Esquire James D. Love, Esquire	
11-6-00	Def. City of Bham's Motion to Reconsider SJ filed in Open Court	
[illegible]	[illegible] Filed in Open Court	

§ 15-10-3. Arrest without warrant — When and for what allowed; definitions; written report of family violence regardless of arrest.

(a) An officer may arrest a person without a warrant, on any day and at any time in any of the following instances:

(1) If a public offense has been committed or a breach of the peace threatened in the presence of the officer.

(2) When a felony has been committed, though not in the presence of the officer, by the person arrested.

(3) When a felony has been committed and the officer has reasonable cause to believe that the person arrested committed the felony.

(4) When the officer has reasonable cause to believe that the person arrested has committed a felony, although it may afterwards appear that a felony had not in fact been committed.

(5) When a charge has been made, upon reasonable cause, that the person arrested has committed a felony.

(6) When the officer has actual knowledge that a warrant for the person's arrest for the commission of a felony or misdemeanor has been issued, provided the warrant was issued in accordance with this chapter. However, upon request the officer shall show the warrant to the arrested person as soon as possible. If the officer does not have the warrant in his or her possession at the time of arrest the officer shall inform the defendant of the offense charged and of the fact that a warrant has been issued.

(7) When the officer has reasonable cause to believe that a felony or misdemeanor has been committed by the person arrested in violation of a protection order issued by a court of competent jurisdiction.

(8) When an offense involves domestic violence as defined by this section, and the arrest is based on probable cause, regardless of whether the offense is a felony or misdemeanor.

(b) For the purpose of this section, the following terms have the following meanings:

(1) ABUSE. Any offense under Sections 13A-6-60 to 13A-6-70, inclusive, or under Sections 26-15-1 to 26-15-4, inclusive.

(2) ASSAULT. Any offense under Sections 13A-6-20 to 13A-6-25, inclusive.

(3) FAMILY, HOUSEHOLD, OR DATING OR ENGAGEMENT RELATIONSHIP MEMBERS. Includes a spouse, former spouse, parent, child, or any other person related by blood, marriage, or common law marriage, a person with whom the victim has a child in common, a present or former household member, or a person who has or had a dating or engagement relationship.

(4) DOMESTIC VIOLENCE. Any incident resulting in the abuse, assault, harassment, or the attempt or threats thereof, between family, household, or dating or engagement relationship members.

(5) HARASSMENT. Any offense under Section 13A-11-8.

(c) When a law enforcement officer investigates an allegation of domestic violence, whether or not an arrest is made, the officer shall make a written report of the alleged incident, including a statement of the complaint, and the disposition of the case. (Code 1852, § 445; Code 1867, § 3994; Code 1876, § 4664; Code 1886, § 4262; Code 1896, § 5211; Code 1907, § 6269; Code 1923, § 3263; Code 1940, T. 15, § 154; Acts 1989, No. 89-857, p. 1710, § 2; Acts 1995,

§ 11-47-190. When municipality liable; joint liability of other persons or corporations.

No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless said injury or wrong was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefor and while acting in the line of his duty, or unless the said injury or wrong was done or suffered through the neglect, carelessness or failure to remedy some defect in the streets, alleys, public ways or buildings after the same had been called to the attention of the council or other governing body or after the same had existed for such unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council or other governing body and whenever the city or town shall be made liable to an action for damages by reason of the unauthorized or wrongful acts or the negligence, carelessness or unskillfulness of any person or corporation, then such person or corporation shall be liable to an action on the same account by the party so injured. (Code 1907, § 1273; Code 1923, § 2029; Code 1940, T. 37, § 502.)

§ 6-5-338. Peace officers; on or off duty.

(a) Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state, whether appointed or employed as such peace officer by the state or a county or municipality thereof, or by an agency or institution, corporate or otherwise, created pursuant to the Constitution or laws of this state and authorized by the Constitution or laws to appoint or employ police officers or other peace officers, and whose duties prescribed by law, or by the lawful terms of their employment or appointment, include the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.

(b) This section is intended to extend immunity only to peace officers and governmental units or agencies authorized to appoint peace officers. No immunity is extended hereby to any private non-governmental person or entity, including any private employer of a peace officer during that officer's off-duty hours.

(c) Every private, non-governmental person or entity who employs a peace officer during that officer's "off-duty" hours to perform any type of security work or to work while in the uniform of a peace officer shall have in force at least $100,000 of liability insurance, which insurance must indemnify for acts the "off-duty" peace officer takes within the line and scope of the private employment. The failure to have in force the insurance herein required shall make every individual employer, every general partner of a partnership employer, every member of an unincorporated association employer, and every officer of a corporate employer individually liable for all acts taken by an "off-duty" peace officer within the line and scope of the private employment.

97136

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JOHN CHARLES SUTHERLAND,

Plaintiff,

v. CASE NO. CV-98-7553

COLONIAL BANK, an Alabama banking institution, et al.,

Defendants.

PLAINTIFF'S RESPONSE AND MEMORANDUM IN OPPOSITION TO CITY OF BIRMINGHAM'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, by and through his attorneys of record, John L. Cole and Linda L. Cole, files the following response in opposition to the City of Birmingham's Motion for Summary Judgment:

FACTS

John Charles Sutherland sued Colonial Bank, Mark Renda, as the branch manager of Colonial Bank, and the City of Birmingham on December 22, 1998, in the Circuit Court of Jefferson County, Alabama, for false imprisonment, defamation, assault and battery. The basis for the complaint is an incident at the former

location of Colonial Bank at 18th Street and 5th Avenue South which occurred on June 23, 1997 at approximately 3:00 p.m.

Mr. Sutherland had been a customer of Colonial Bank for several years and on June 27, 1997, he had a line of credit with Colonial and had a business checking account under the name of "Johnnie C. Sutherland d/b/a Sutherland Environmental." Twenty-five days earlier, on June 2, 1997, Mr. Sutherland cashed a Fifty-Dollar ($50) check at the branch on 18th Street South, which was drawn on his account. (See "**Exhibit 1**": **Deposition of John Sutherland, pp. 82-83**). A copy of said check is attached hereto as "**Exhibit 2**" and was previously marked as Defendant's Exhibit 2 to John Sutherland's deposition.

Mr. Sutherland went in the same branch on June 27, 1997, to make a loan payment and cash a check. (See **"Exhibit 3": Deposition of John Sutherland, p. 89**) A teller informed Mr. Sutherland that he would have to see the branch manager before she could cash his check. (See **"Exhibit 4": Deposition of John Sutherland, pp. 90-91**) The plaintiff believes his account was "flagged" to alert the tellers if he came into the bank. Mr. Sutherland went into Mark Renda's office and was accused of cashing two (2) bad checks totaling One Thousand

Dollars ($1,000) the last time he was in the bank. Mr. Sutherland denied any knowledge of the two (2) checks Renda showed him. (See **"Exhibit 5": Deposition of John Sutherland, pp. 104)** Mr. Sutherland maintains that Renda told him "the bank is going to get their money back." (See **"Exhibit 5": Deposition of John Sutherland, pp. 104 & 120)** Renda denies making the accusation or statement. (See **"Exhibit 6": Deposition of Mark Renda, p. 171)** Mr. Renda did admit that when confronted about the checks, Mr. Sutherland appeared "surprised." (See **"Exhibit 7": Deposition of Mark Renda, p. 128)**

These two subject checks were purportedly drawn on an account of Tyrone T. Clayton at Bank One in Austin, Texas, and made payable to a "Mary Hancock" and an "L. Brock". The checks appear to have initials in the upper left corner okaying the checks. A copy of the two checks is attached hereto as **"Exhibit 8"** and previously marked as Defendant's Exhibit 3 to John Sutherland's deposition. It is noteworthy to point out that Mr. Sutherland's name does not appear on either one of these checks as the payer, payee or endorser, nor does his account number, driver's license number or date of birth. **("Exhibit 8")** The Defendant, Mark Renda has admitted in prior testimony that there is nothing on either check linking Mr. Sutherland except

an internal bank transaction code on his check cashed on June 2, 1997 and on the two "bad" checks drawn on Tyrone Clayton's accounts which correspond with the teller's tape. (See **"Exhibit 9": Deposition of Mark Renda, pp. 94-98**).

The plaintiff contends that on June 2, 1997 the teller failed to close Mr. Sutherland's transaction resulting in the same transaction code number appearing on the next customer's transaction - the two bogus checks.

Mr. Renda has further admitted that his own checking account number appears on the reverse side of both of the "bad" checks and that his wife's name, "Nena Renda," appears as an endorsement on the check made payable to L. Brock. (**"Exhibit 8"**) Mr. Renda testified at his deposition that someone had gotten his and his wife's checking account number and had fraudulently used the account number to obtain money. (See **"Exhibit 10": Deposition of Mark Renda, pp. 77, 86 & 89**)

After the confrontation on June 27, 1997 by Mr. Renda, Mr. Sutherland left the bank frightened and concerned. (See **"Exhibit 11":Deposition of John Sutherland, pp.122**)He drove around for several

minutes trying to absorb what had just happened. He dropped off some mail and the more he thought about it, the more concerned he became that the bank would debit his checking account, causing his checks to bounce. (See **"Exhibit 12": Deposition of John Sutherland, pp. 124 & 125**) He returned to the bank and walked to Mr. Renda's office and observed he was on the telephone. (See **"Exhibit 13": Deposition of John Sutherland, pp. 126 & 127**) Renda testified Mr. Sutherland said in a loud voice "I'm mad and I want to see you right now." (See **"Exhibit 14": Deposition of Mark Renda, pp. 130**) Mr. Sutherland testified that he said "I need to talk to you." (See **"Exhibit 13": Deposition of John Sutherland, pp. 127**) Renda indicated to him to wait in the lobby area, which he did. (See **"Exhibit 15": Deposition of John Sutherland, pp. 129**) Renda was on the telephone with a detective at the UAB Police Department and Renda told the detective that Sutherland was back in the bank and the detective sent out a radio dispatch. (See **"Exhibit 16": Deposition of Mark Renda, pp. 132 & 133**)

As Mr. Sutherland waited on Renda, a man dressed in street clothes came in and walked past him into Renda's office for just a few seconds. (See **"Exhibit 18": Deposition of John Sutherland, pp. 136**) Renda testified that he pointed to Mr. Sutherland and said

"that's him." (See **"Exhibit 19": Deposition of Mark Renda, pp. 136**) This man came out of Renda's office and as he approached Mr. Sutherland, he pulled a gun, pointed it at his head and shouted at him to "freeze" and "don't move." Mr. Sutherland said the man identified himself as "Birmingham Police" and yelled at him several times "don't move." Mr. Sutherland was afraid he was going to be shot by this man. At that point, he was patted down and his arms were twisted behind his back and he was handcuffed, put in a chair, and displayed in the lobby in front of everyone for approximately twenty (20) minutes. During this time patrol cars came to the bank with sirens and flashing lights with a number of police officers coming into the bank and standing over Mr. Sutherland. Also during this time, many customers came into the bank while Mr. Sutherland was on full display. (See **"Exhibit 20": Deposition of John Sutherland, pp, 131-144, 151**)

He was subsequently placed in a patrol car, still handcuffed, and taken to police headquarters where he was interrogated by a detective with the Birmingham Police Department. Approximately one hour later, he was released and taken back to his car at Colonial Bank. (See **"Exhibit 21": Deposition of John Sutherland, pp. 162-163**)

No formal criminal charge was ever brought against Mr. Sutherland.

The plaintiff has learned through discovery in this case and from information supplied by Colonial's attorney that the bank surveillance tape of the bank lobby on June 27, 1997, which would be the best evidence of Mr. Sutherland's demeanor the first and second time he came into the bank, has conveniently disappeared.

Even if John Sutherland was a potential suspect, he was a long time customer in good standing. (See **"Exhibit 22": Deposition of Mark Renda, pp. 125**) This should have been a "red flag" to Renda, but it was not.

LAW & ARGUMENT

A summary judgment is proper only when there is a genuine issue of a material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Ala. R. Civ. P. The Alabama Supreme Court has held that the trial court in determining whether a summary judgment should be entered, must view the evidence in a light most favorable to the non-moving party. Wayne J. Griffin Electric, Inc. v. Dunn Construction Co., 622 So. 2d 314 (Ala. 1993); Motes v. Matthews, 497 So. 2d 1121 (Ala. 1986).

The Alabama Supreme Court has further held the party opposing a motion for summary judgment must present "evidence of such weight and quality that fair minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co., 547 So. 2d 870, 871 (Ala. 1989).

In applying this "two-tiered" standard, the plaintiff argues that he has sufficiently met his burden to properly oppose and defend the City's motion for summary judgment. Mr. Sutherland does not have to present direct evidence of the false imprisonment/arrest, nor of the assault. The Plaintiff contends that he has presented substantial evidence - "evidence of such weight and quantity that fair minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought." Hays v. Olzinger, 669 So. 2d 107 (Ala. 1995).

The first material fact that is in dispute is whether Mr. Sutherland was arrested or just "detained" on June 27, 1997 as the City contends. It is undisputed that a gun was pointed at his head, he was handcuffed and restrained from leaving the bank. It is elementary that Officer Wooten arrested Mr. Sutherland. A multitude of appellate cases exist in the state defining what

constitutes an "arrest." As early at 1852 the Alabama Supreme Court held that "no manual touching is necessary as it suffices if the party is in the power of the officer and submits." Field v. Ireland, 21 Ala. 240 (1852). The Plaintiff contends that he has presented substantial evidence that there is a genuine and material dispute of fact of whether or not Mr. Sutherland was detained or arrested without a warrant on June 27, 1997 by Officer Wooten.

If the Court concludes that if a jury could find that Officer Wooten made a warrantless arrest that day and did not merely "detain" Mr. Sutherland, then the Court must consider whether or not Officer Wooten had probable cause to make a warrantless arrest. Our state supreme court has held for at least 93 years that the power to make a warrantless arrest is an extraordinary power given police officers and must be strictly construed. Sanders v. Davis, 153 Ala. 375, 44 So. 979 (1907); Gibson v. State, 193 Ala. 12, 69 So. 533 (1915). Under the Fourth Amendment to the United States Constitution, citizens have the right not to be arrested without probable cause. Motes v. Myers, 810 F. Supp. 1055 (11th Cir. 1987).

The Plaintiff admits that under Alabama law a police officer may make a warrantless arrest of an

individual when "he has reasonable cause to believe that the person arrested has committed a felony." §15-10-3, Code of Alabama (1975). The central question is whether a jury could find that Officer Wooten lacked sufficient facts and information to make a warrantless arrest on June 27, 1997. The Alabama Court of Criminal Appeals has held that the "reasonable man" standard should be applied in determining what amounts to probable cause in a warrantless arrest. State v. Hanson, 480 So. 2d, 2020 (Ala. Cr. App. 1985). In that case the Court of Criminal Appeals adopted a long line of cases from the United States Supreme Court and from other Alabama appellate courts in holding that sufficient facts and information must be available to an officer exercising reasonable caution in the belief that a crime has been committed **at the moment of arrest**.

The Plaintiff submits that the record clearly shows that at the moment of arrest Officer Wooten had no knowledge of any facts or circumstances that would lead a reasonable man to believe John Sutherland had committed any crime, not withstanding that a crime may have been committed previously, but no facts or evidence whatsoever that John Sutherland may have committed a crime. Furthermore, this Court must consider that a jury could find that Officer Wooten could have made certain factual inquires **before** he put

a gun to Mr. Sutherland's head, torqued his arms and handcuffed him. But Officer Wooten failed to do that based on the evidence before this Court from Mr. Sutherland's deposition and the Defendant Mark Renda's deposition. This point is further emphasized by the undisputed fact that John Sutherland was later released after meeting with a detective with the Birmingham Police Department and from the failure of the City to rebut Mr. Sutherland and Mr. Renda's prior testimony with any sworn testimony by Officer Wooten.

The City appears to rely on the fact that Mark Renda signed on Incident/Offense Report accusing Mr. Sutherland of presenting two forged instruments for payment on June 2, 1997. That apparently somehow legally justifies Officer Wooten's actions, according to the City. This attempted justification is misplaced since the arrest took place **before** this Incident/Offense Report was completed by Officer Wooten and signed by Renda. Accordingly, if a jury could find that Officer Wooten acted "negligently, carelessly, or unskillfully" then the City would not have immunity under §11-47-190, Code of Alabama (1975), Franklin v. City of Huntsville, 670 So. 2d 848, (Ala. 1995); Newton v. Town of Columbia, 695 So. 2d, 1213 (Ala.. Civ. App. 1997); Rose v. Town of Jackson's Gap, 952 F. Supp. 757 (M. D. Ala. 1996). The Plaintiff submits that there is sufficient

evidence to create a genuine issue of material fact as to whether Officer Wooten made an arrest and that he lacked probable cause to make the arrest. The City's motion for summary judgment is due to be denied.

The City also contends that it is entitled to summary judgment because of a qualified immunity under § 6-5-338, Code of Alabama (1975) on the apparent theory that if Officer Wooten did make an arrest but lacked probable cause under Alabama law to make that arrest, the unlawful arrest would have been within his discretionary function as a police officer. This contention is also equally misplaced.

In an opinion issued on November 19, 1999, the Alabama Supreme Court held that "probable cause to arrest is not the amount of admissible evidence that is needed to convict a person of a particular crime; instead, it exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime." Ex Parte City of Montgomery, (1981191 Ala. 1999), 1999 WL 1046444. In that case the Alabama Supreme Court reversed and remanded the Court of Civil Appeals order reversing the trial court's entry of summary judgment in favor of the City of Montgomery and the arresting officer who had been

sued for malicious prosecution, false arrest and assault and battery. The facts in that case were that the arresting officer was investigating an auto accident and noticed the defendant was unsteady on her feet, had bloodshot eyes, acted incoherent and failed the field sobriety test. The defendant admitted she had some alcohol to drink and a prescription nerve pill that should not have been mixed with alcohol. The toxicology reading was .01. She was subsequently found guilty of DUI. Clearly, the arresting officer had sufficient facts on which he could have reasonably believed that the driver was under the influence of alcohol and/or a controlled substance.

The Court in Montgomery, further held that while there are no hard and fast rules concerning when there is or is not probable cause to arrest when an officer is engaged in a discretionary function, if an officer's actions were in bad faith, wilful or malicious, those kinds of acts "will not be considered discretionary in nature." Montgomery, at page 5. *See also* Couch v. City of Sheffield, 708 So. 2d 144; Rose v. Town of Jackson 6 AP, 952 F. Supp. 757 (M.D. Ala. 1996).

The plaintiff contends that a jury could find that officer Wooten, at the very least, exceeded his authority. A jury could find that rather than pull a gun on Mr.

Sutherland, handcuff and restrain him, he could have simply asked Mr. Sutherland to step into Renda's office and attempt to ascertain what the facts were before arresting him. The plaintiff has offered undisputed evidence that Wooten failed to do that.

The City's motive for summary judgment for immunity under § 6-5-338 is also due to be denied.

CONCLUSION

The plaintiff has met the burden of proof and has raised disputed facts as to whether probable cause existed and whether Officer Wooten's actions were reasonable on June 27, 1997.

Respectfully submitted this the 28th day of August, 2000.

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CERTIFICATE OF SERVICE

This is to certify that on this the 28th day of August,

2000, a copy of the foregoing document has been served upon counsel for all parties to this proceeding by the following method:

_____ Mailing the same by first-class United States mail, properly addressed and postage pre-paid.

_____ Hand Delivery

_____ Facsimile and by mailing the same by first-class United States mail, properly addressed and postage pre-paid.

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OF COUNSEL

(The following proceedings were held inside the presence and hearing of the jury.)

THE COURT: We have one small item to read in that the counsel wants to read into you, and it's part of an interrogatory, and I'll explain what that is later

MR. SPENCER: If I may, Judge, and these were -- I am just reading the defendant, City of Birmingham, response to plaintiff's first set of interrogatories -- Defendant City of Birmingham response to plaintiffs first set of interrogatories. "Comes now the City of Birmingham a municipal corporation existing under the laws of the State of Alabama a defendant in the above entitled cause in answers to plaintiff's first set of interrogatories as follows: Interrogatory number one, state the name and official capacity of the person answering these interrogatories. Response one, James D. Love, Assistant City Attorney.

"Interrogatory 17, were quotation mark, closed quote, hand cuffs or any other type of restraint put on plaintiff? If so, state the type of restraints used, the conduct of the plaintiff which warranted restraint, the name and person who used the restraint. Response 17. Yes. Period. Officer Wooten placed hand cuffs on the felony suspect.

"Interrogatory 19. Did anyone making this arrest and/or detention touch or strike the plaintiff? If so, state the name of any such person, what he did to plaintiff, and the conduct of plaintiff that warranted the touching or striking. Response 19. Officer Wooten touched the suspect when he was hand cuffed and searched. The plaintiff was a felony suspect."

THE COURT: Well, y'all argue. I've made up my mind. And I'll tell y'all this: The Court is going to find as a matter of law that I find that Officer Wooten had probable cause and acted within his authority to make the arrest; therefore, the temporary detention was also justified. I find as a matter of law and a matter of fact that you can do something legally but do it in an illegal way.

So I find that they can proceed to the jury on negligence, assault and battery, and the subpart, excessive use of force, which is part of that assault and battery. So we need to just talk about assault and battery then on the jury charges. Y'all need a matter of time to go over the charges again and see what you want to present to the Court and what you don't want to present?

MS. COLE: We probably do.

MR. LOVE: Just assault and battery, and what was the other one, Judge?

THE COURT: The other part is negligent use of excessive force, which I regard as a part of assault and battery. It's not a separate charge. It's an allegation within the assault and battery.

MR. EDENS: Is this just another way of saying assault and battery?

MR. LOVE: That's what the Court is saying.

THE COURT: It's just another way of saying assault and battery.

MR. LOVE: Your Honor, as to that, and we appreciate the rest of the claims being gotten on here, as to that, I believe the Court's more concerned about those issues because of a case of Franklin B. Huntsville. But we believe 65338, after the Duval case and all the rest have gotten rid of Franklin B. Huntsville, and, therefore, there cannot be an assault and battery against a municipality. It can be against a police officer and not a municipality. We understand the Court has made it's ruling, and we object only to that part. Thank you.

THE COURT: The Court is going to rule that even though the officer may have had probable cause and discretionary immunity, that it may have been exercised improperly, and that's the ruling. And y'all can go with that.

(END OF DAY)

MR. SPENCER: One other issue we'd like to get on the record as it pertains to your findings and rulings as to the false arrest and false imprisonment, and I'll make this quick. I believe those are issues that should have gone to the jury. I believe everything should have gone to the jury to include the immunity, so we would object to that.

However, as a more practical matter, we think if you're the person making a finding as a matter of law, that the only position you're going to make is a matter of law too is whether immunity applies to those two claims, not whether the underlying substitive issue is decided. In other words, I believe you may be able to come out and say I find immunity for false arrest and false imprisonment based on what you've heard. But I don't believe you're able to say — make a determination on the facts, which we believe there are issues material facts as to those things.

If you find there is immunity to those two, it doesn't go to the jury, but I don't believe, because of the material facts in issue, the testimony that was put before the Court, that you're able to say as a matter of law you find that substitive issue decided. I believe you can or you may be able to. I'm not going to consider that. But I believe you may be able to say that there's an immunity on this at this time but not that you decide the underlying facts that makes sense. And that is a difference and a big difference.

THE COURT: Well, I'm going to let the great fathers and mothers in Montgomery decide those matters.

THE COURT: Let me ask you y'all this: We've got this to talk about. Should we go forward? We have charges to talk about. No way we're going to get into closing today.

MS. COLE: I don't think so.

MR. SPENCER: Judge, what I recommend is, I would like to respond to a subsitive argument, however, what the Court is asking — what's the procedural part? My understanding, but I'm not sure on this. I'm not trying to authoritatively state this at all, what is a question of law for you, and what's the question for the jury?

I believe that I've seen case law that says it is a question of law about the discretionary immunity. If that's the case, what we would have is for the Court at this time to look at the facts and make your ruling on the discretionary function issue. What survives is then to be given to the jury, and the jury would only decide under the Municipal Liability Act. That would be the only thing that would go to them because you would have already decided the Discretionary Immunity Act. I don't know for sure that that's what happens, so it may be a good time to —

THE COURT: Case law is not real clear.

MR. SPENCER: Right. And it may be a good time,

Your Honor, to deal with all the jury charges and all this other stuff and let everybody hit the book, and be able to give you a more definitive argument. But I have seen case law that says it's a question of law, so if that's the case, I believe procedurally that may be correct.

But then again, you know, it almost seems it turns on the facts, that it should be something that's preserved for the jury because, you know, one of the things as we argue and as it currently stands is whether Officer Wooten acted beyond his authority under a mistakenly interpretation of the law. We would argue at least to the extent of the excessive force argument, that his testimony that any time there's a felony, he can pull his weapon and point it at someone is a mistaken interpretation of the law. It's beyond his authority. It's totally against the Fourth Amendment and the laws that stand.

There's law clear to that affect. The fact that he understood that was his interpretation of his authority of the law at the time, we would think it takes him outside the discretionary function.

MR. EDENS: There's no Fourth Amendment claim here.

MR. SPENCER: It doesn't matter about the claim.

We're going back to his understanding of the law. The judge knows the Fourth Amendment. The judge can make that ascertation.

MR. EDENS: He's not liable because he's not charged nor is the City charged with his violating your client's constitutional rights. This is not a civil rights lawsuit.

MR. SPENCER: No. What that issue goes to is Mr. Wooten's interpretation of the law at that time. Just because it's not charged in this lawsuit doesn't mean that he has the authority or that he can misinterpret that law and use an excessive force in opposition of that law. He's testified to what he's testified to. And the law is what the law is.

THE COURT: Let's do this. I'm going to bring the jury in and explain to them that we're going to let them go home and start tomorrow. Whatever is left of the case will be finished in the morning.

(The following proceedings were held inside the presence and hearing of the jury.)

THE COURT: We have one small item to read in that the counsel wants to read into you, and it's part of an interrogatory, and I'll explain what that is later on.

searched. The plaintiff was a felony suspect."

THE COURT: Thank you. Now, we have another hour or so we have to talk on matters of law. Would y'all rather go home or sit here.

THE JURY: Let's keep going.

THE COURT: We're talking about 6:00 or 7:00 tonight y'all will still be here. Be back at ten minutes to 9:00 in the morning. We'll be through with the legal arguments. We'll have it ready to go with closing arguments.

(The following proceedings were held outside the presence and hearing of the jury.)

MS. COLE: I'm not sure of the law on this case. That's what I'm not sure of.

THE COURT: That's what I said, and they said they don't have anything else they want to say. Do y'all?

MR. SPENCER: Judge, I'm not sure. We'd argue -- I'm not sure, Your Honor. I'm not sure if it goes to the jury. We would say it should go to the jury.

THE COURT: I don't know of a case on point right on that point. I don't know because most of the cases you see on the discretionary immunity were summary judgment-type. I don't know of one that went to a jury.

MR. SPENCER: And judge, we'd argue that it should go to the jury since it goes to the facts in this case.

MR. LOVE: Your Honor, I believe ex parte Tuscaloosa Sheffield, all these cases are dealing with police officers and their discretion and response.

MR. SPENCER: While you're looking up, we're talking about the procedural question.

THE COURT: That's all. Not the merits of it. Procedural.

MR. LOVE: Well, obviously we don't believe that should go to the jury at this point.

THE COURT: But you're talking about the substitive matter of the whole case?

MR. LOVE: Yes.

THE COURT: You're not talking about the procedural matter, whether or not the Court decides discretionary immunity or the jury decides it?

MR. LOVE: Well, I believe the Court has to decide the discretionary immunity.

THE COURT: Anything else?

MR. LOVE: I mean we don't have immunity.

THE COURT: That's a duty — is that a duty thing, or is that a substitive matter?

MR. LOVE: Let me say this: I would disagree

TRIAL TESTIMONY

DEWAYNE VANERMARK

Opening. Not evidence.

THE COURT: Normally attorneys have a lot of freedom in opening and closing. Just remember this is not evidence.

MR. LOVE: Gentleman walked out of the bank in Bessemer for these suspicious people, the security guard. That security guard is dead now. Suspicious people can hurt you. They shot him in the head.

Office Wooten is still here today. Rather be tried by 12 than carried by 6. Thank you.

THE COURT: Ladies and gentlemen, y'all ready for testimony? Okay. First witness.

MS. COLE: May it please the Court. Plaintiff calls Dewayne Vandermark.

DEWAYNE VANDERMARK,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. COLE:

Q. Good afternoon.

A. Good afternoon.

Q. Would you please state your full name and place of employment?

A. Everett Dewayne Vandermark, and I am employed by Colonial Bank.

Q. And were you employed at Colonial Bank on June 2nd, 1997?

A. Yes, ma'am.

Q. And were you employed at Colonial Bank on June 27th, 1997?

A. Yes, ma'am.

Q. In what capacity?

A. Security officer.

Q. And is that still your title today?

A. Yes.

Q. How long have you been employed with Colonial Bank, Mr. Vandermark?

A. 14 years.

Q. Some time in the summer of 1997, did you learn that two checks had been cashed at the branch over on Southside that were drawn on a bogus account out in Texas?

A. Yes.

Q. And did you bring these checks with you today?

A. Yes. I gave them to him.

MS. COLE: May I approach, Your Honor?

THE COURT: Sure.

(A discussion was held outside of the hearing but in the presence of the jury.)

Q. (By Ms. Cole) I'd ask you to take those out, please, sir?

A. (Witness complies.)

Q. You've just handed me some copies; is that correct?

A. Yes.

Q. Let me ask you to look at something I've already marked --

THE COURT: Do you want to see those, Mr. Love?

MR. LOVE: Yes.

Q. (By Ms. Cole) Mark these at Plaintiff's Exhibits 3 and 4.

(Plaintiff's Exhibit Nos. 3 and 4 were marked for identification.)

Q. (By Ms. Cole) Can you identify Plaintiff's Exhibit No. 3, Mr. Vandermark?

A. Yes. That's one of the checks.

Q. And what is the date on that check?

A. May 17th, '97.

Q. And what's the amount?

A. $500.

Q. And what account is it proported to be drawn on?

A. On a Tyrone T. Clayton in Austin, Texas.

Q. And is made payable to who or to whom?

A. I can't tell the signature.

Q. Can you read the endorsement on the back of the check?

A. L. Brock.

Q. And what date was that check -- or can you tell from that copy of the check what date that check was negotiated at Colonial Bank?

A. There's a date stamp on the back of June the 3rd, '97.

Q. All right. And go ahead. I'm sorry.

A. And there's also June 2nd. June 3rd is probably when it cleared.

Q. Cleared where?

A. Well, would have gone through bank one was the bank he withdrew on.

Q. So is it your testimony then that that bank, the best you can tell from those copies, that check was cashed at Colonial Bank on June the 2nd, 1997?

A. Correct.

Q. Is there anywhere on Plaintiff's Exhibit 3 John Charles Sutherland's name?

A. No, ma'am.

Q. Is there anywhere on Plaintiff's Exhibit 3 Mr. Sutherland's checking account number, if you know?

A. May I look at one of his checks?

Q. Certainly. Do you have a copy?

A. No, ma'am.

Q. Is there anything, looking at that copy today, is there anything on that check that would identify John Charles Sutherland to your knowledge?

A. No.

Q. Okay. And do you know where the original check dated May 17th, 1997, from Tyrone T. Clayton's account is?

A. No, ma'am, I don't.

Q. Did you ever see the original check?

A. No.

Q. Do you know if it was ever given to the police department?

A. I heard it was, but I'm not sure.

MR. LOVE: Objection. Your Honor, we move to hearsay.

THE COURT: Sustained.

MS. COLE: We offer Plaintiff's Exhibit No. 3 with the understanding this copy is not the original check.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 3 was received into evidence.)

Q. (By Ms. Cole) Are you claiming the copy is --

the original is unavailable?

A. Yes.

Q. Ask you to take a look at Plaintiff's Exhibit No. 4 and see if you can identify that, please, sir.

A. Check named Tyrone T. Clayton. It's signed that way.

Q. What is the date on that check?

A. It looks like 5/19/97.

Q. Based on the information and knowledge that you have, is it also a check that was cashed at Colonial Bank on or about June the 2nd, 1997?

A. Yes, it is, based on endorsement.

Q. And who is that check made payable to?

A. Endorsed to Mary. I can't tell what that last name is.

Q. Is there anything on that check that indicates the name of John Charles Sutherland?

A. No, ma'am.

Q. Anywhere on that check that you can see Mr. Sutherland's checking account number?

A. No.

Q. And did we establish what date that check was presented for payment at Colonial Bank?

A. Stamped June the 2nd, '97.

Q. Okay. Do you know what happened to the check

your knowledge?

A. No. No, they did not.

MS. COLE: Offer Plaintiff's Exhibit 4.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 4 was received into evidence.)

MS. COLE: May I pass these, Your Honor?

THE COURT: Yes, ma'am.

MS. COLE: Thank you.

Q. Do you know, Mr. Vandermark, if Tyrone T. Clayton had a checking account on June the 2nd, 1997, with Colonial Bank?

A. No, I do not believe he did.

Q. On June the 2nd, 1997, as part of the security department, for lack of a better word, with Colonial Bank, do you know if the branch on 18th Street South and 5th Avenue South, had any type of surveillance cameras?

A. Yes, they did.

Q. Were those installed inside or outside the bank?

A. Inside the bank.

Q. And on a typical surveillance tape, what would you expect to see on a typical bank day?

A. You would see people coming in and out of the

bank, standing at the teller line.

Q. Did the bank surveillance tape on June the 2nd, 1997, show the drive-through window areas?

A. No, it did not.

Q. Did that branch on June the 2nd, 1997, to your knowledge, have any drive-through windows?

A. It did.

Q. Do you know how many?

A. You had the window and then you had so many lanes.

Q. All right. Did you bring that bank surveillance tape with you today?

A. Yes, I did.

Q. Is it in that envelope?

A. No. I believe it's in the machine.

MS. COLE: Your Honor, at this time, we would like to play the tape, the bank surveillance tape of June the 2nd, 1997 -- well, let me back up and start over again.

Q. Did you bring a teller tape that I subpoenaed for June the 2nd, 1997, with you?

A. Yes, I did.

Q. All right. Let's take a look at that. The bank surveillance tape of June the 2nd, 1997, the teller tape. I'm going to ask you to take a look at what I've

already marked as Plaintiff's Exhibit 2 and see if that is a copy of the requested document?

A. Yes, it is.

Q. All right. And can you identify for the jury Plaintiff's Exhibit 2.

(Plaintiff's Exhibit No. 2 was marked for identification.)

A. It is a teller tape that reflects transactions.

Q. Can you tell the jury what a teller tape is?

A. Well --

Q. In a short version, shorthand version?

A. When you go to the bank and make a deposit or cash a check, the teller is to run this machine that shows the transactions.

Q. And those transactions give a type of code for audit purposes for the bank?

A. Well, it's got the account number. It's got the time and the dollar amount.

Q. Do we -- have you ever heard the term "encoding"?

A. I've heard of it.

Q. Is that what this teller tape does or the teller machine; is that what it does?

A. I believe that's correct.

Q. Is there a code on these two checks, the two $500 checks that we talked about that would indicate to you at approximately what time or any way to cross-reference what time these two $500 checks were cashed at Colonial Bank?

A. No. It doesn't give a time on it. On some checks it will reflect on the front of the check itself the time and, of course, the dollar amount.

Q. If you wanted to know approximately what time those checks were negotiated at the branch, how would you go about finding out?

A. You would look at the teller tape.

Q. All right. And does the teller tape indicate to you at what time the checks were cashed at the branch?

A. Yes, it does.

Q. What time was that?

A. Are we talking about the two $500 checks?

Q. Yes. The two $500 checks.

A. The first one was at 10:00 a.m. on June 2nd, '97, and the second one was 10:01 on June 2nd, '97.

Q. Does that teller tape indicate to you or reflect that Mr. Sutherland on that same day at approximately the same time cashed a $50 check?

A. Yes, it does.

Q. And what time was his $50 check cashed?

A. 10:00 a.m., June 2nd, '97.

Q. Was it the same teller?

A. Yes, to my understanding it was, yes.

Q. And based on the teller tape in front of you, Plaintiff's Exhibit 2?

A. Yes.

MS. COLE: Offer Plaintiff's Exhibit 2.

MR. LOVE: No objection.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 2 was received into evidence.)

Q. (By Ms. Cole) Mr. Vandermark, just so we're clear, you didn't come to court voluntarily today. You were served a subpoena; is that correct?

A. That's correct.

Q. You brought the tape, the bank surveillance tape with you dated June the 2nd, 1997 --

A. Yes.

Q. -- is that correct? And just so the jury knows, rather than running through the day's transaction, we've already set it at 9:55 or 9:57 that morning?

A. I believe 9:56, I believe.

MS. COLE: And we'd like to offer the tape at this time.

A. Yes.

Q. And this is surveillance video. And this appears to be what I am going to call "clipping through." Is this what we go to Block Buster and rent and pop in our VCRs, and is this the type of tape --

A. No.

Q. Could you explain?

A. This is a time lapsed tape, and there is several cameras in the branch, and there's a switcher, and it's going from camera to camera, and that's why you can't slow it down to where it's real clear because it's switching to different cameras.

Q. And you've looked at this tape, is that correct?

A. Yes.

Q. And is there anywhere on this tape that you see John Sutherland coming to the bank to cash this $500 check?

A. No, ma'am. I have not seen it.

Q. And what does that indicate to you, Mr. Vandermark?

A. He did not come into the bank.

Q. Well, let's play this forward to a few minutes past 10:00 o'clock. In fact, I'm going to stop it just a moment, and I want to go forward to I think

he's moved it back to 9:48.

A. You want to go forward?

Q. I want to go forward.

A. How far do you want to go to?

Q. Let's go to 9:59.

MR. LOVE: Your Honor, if I might. I don't have any objections to the jury seeing each part of the bank, but the point about Mr. Sutherland not being on the tape, I thought that could be stipulated to, that he wasn't on the tape because he went through the drive-through.

MS. COLE: That's fine, Your Honor.

THE COURT: Okay.

MS. COLE: We don't have any objections. Let's just stop it. All right. You can take your seat.

THE COURT: You notice what high-tech stand we have there too.

Q. (By Ms. Cole) Mr. Vandermark, do you know if anyone was apprehended, whoever presented these, if they were ever apprehended and charged with these crimes?

A. Not to my knowledge.

Q. On June the 27th, 1997, were there surveillance cameras available at Colonial Bank on 18th Street South?

A. Yes.

Q. There was a surveillance tape made of that day?

A. There was.

Q. Do you have that tape with you?

A. No, ma'am.

Q. Do you know where that tape is?

A. No, ma'am.

Q. Did anyone ever tell you where that tape is?

A. No.

Q. Has anyone at Colonial Bank had that surveillance tape to your knowledge?

A. Not to my knowledge.

Q. Would it be the bank officer, another department?

A. No.

Q. Or another employee?

A. No.

Q. Do you know of your own knowledge if that tape was ever given to a third person?

A. I heard that it was.

MR. LOVE: Objection, speculation.

THE COURT: Sustained.

Q. (By Ms. Cole) To your knowledge, do you know if that tape was ever given to any law enforcement officer?

A. Not to my knowledge, no.

Q. To your knowledge, was Colonial -- did Colonial Bank ever charge John Sutherland with any crime in regards to these two checks drawn on the account of Tyrone T. Clayton?

A. No.

Q. I believe that's all I have, Your Honor, at this time.

CROSS-EXAMINATION

BY MR. LOVE:

Q. I just have a few questions, Mr. Vandermark. Let's look at Exhibit three. What is -- what are these initials? What do they stand for?

A. Normally a teller has a certain limit they can prove in cashing a check, and they are required to get the supervisor's initials or signature.

Q. Would that have been the proper initials for that teller to the best of your knowledge?

A. She would just have had a supervisor initial it.

Q. Did you have a supervisor in the bank with these initials on it, with these initials?

A. I can't make out them initials.

Q. I believe they are L.R. How about on Plaintiff's Exhibit 4?

TRIAL TESTIMONY

MARK RENDA

Q. Did Mr. Sutherland admit or deny that he had any knowledge about those checks?

A. He told me that he had never seen the checks before.

Q. And what was his demeanor at that time?

A. He was surprised.

Q. At some point in time, did Mr. Sutherland leave the bank?

A. Yes, he did.

Q. And what did you do after that?

A. When he left, I got on the telephone and called an investigator at UAB police, Shawn Rankin, and told him that I had just spoken with Mr. Sutherland, and Mr. Sutherland told me he had never seen the checks before, and I told the officer I didn't really know, you know, where to go. I was going to continue the investigation. Is that all you want me to say on that question?

Q. Well, let's see if we can get back on track here. Did you immediately call Shawn Rankin or did some time lapse after Mr. Sutherland left the bank before you called --

A. No, I immediately called him.

Q. And how long were you on the phone with Officer Rankin?

A. Probably about 10 or 12 minutes.

Q. At some point in time -- well, let me withdraw that.

To your knowledge, Mr. Renda, did the UAB Police Department have any jurisdiction over any actions that happened inside Colonial Bank?

A. Since the UAB branch was located within the realms of UAB, I assumed that they had jurisdiction.

Q. At some point in time after Mr. -- well, let me ask you this: Did you see Mr. Sutherland leave the bank?

A. Yes, I did.

Q. At some point in time did he come back?

A. Yes, ma'am, he did.

Q. And did he come into your office?

A. He came right outside of my office.

Q. Were you still on the telephone?

A. I was still on the phone.

Q. Did Mr. Sutherland say anything to you?

A. Yes, he did.

Q. And what, if anything, did he say to you?

A. He was mad, and he wanted to see me right now, and he said it in a very stern voice.

Q. In your experience as a branch manager, have you ever dealt with customers who were mad in the past?

A. Maybe over to the telephone. Not really in person. Not like that.

Q. How long had you been in the banking business on June the 27th, 1997?

A. Close to 14 years.

Q. And it's your testimony to this jury that in that 14-year period, you have never dealt with a mad customer who had come into the bank on a one-to-one basis?

A. I have -- what I said before is that I've dealt with some irate customers over the telephone. Normally my dealings with customers were very pleasant.

Q. But you testified that Mr. Sutherland said he was mad, and he wanted to talk to you right now?

A. Yes, ma'am.

Q. And you were still on the phone with Shawn Rankin?

A. That is correct.

Q. And what, if anything, did you say or do at that point in time toward Mr. Sutherland?

A. I just told him -- I motioned that I would be with him in just a minute.

Q. You're holding up your finger?

A. Yes, ma'am. I'd be right with him, yes, ma'am.

Q. And what, if anything, did Mr. Sutherland do at that time?

A. He just kind of crossed his arms and was staring at me.

Q. And at some point in time after that, did an individual come into the bank and come into your office while Mr. Sutherland was standing there?

A. The individual came to the doorway of my office.

Q. And do you know who that person was, or did you know at the time who that person was?

A. He let me know he was a police officer for Birmingham.

Q. And at that point in time, you are still on the phone with Shawn Rankin?

A. I had hung up the phone.

Q. Did this individual who identified himself as a Birmingham police officer say anything to you?

A. No.

Q. Did he ask you -- he didn't say anything to you or ask any questions?

A. I just nodded to him that that was the man.

Q. And who were you indicating at that time?

A. Mr. Sutherland.

Q. And did this individual who identified

himself as a Birmingham police officer, did he at that time, at that moment, did he come into your office and look at these checks?

A. No, ma'am, he did not.

Q. Did you give him any type of statement at that time?

A. I said that's him.

Q. You said that's him?

A. Yes.

Q. At that point in time, did you show him the teller tape?

A. I didn't show him anything.

Q. Did you have any other conversation with him at that point in time?

A. No, ma'am, I did not.

Q. After that, after you told him, "That's him," did you see this Birmingham police officer pull his gun and arrest Mr. Sutherland?

A. Before I saw the gun pulled, I saw the police officer ask Mr. Sutherland to take his hand out of his pocket three times.

Q. Did you hear the police officer in a loud voice scream at him and say, "Don't move. Don't move."

A. I heard him say those words after he asked him to take his hand out of his pocket three times.

Q. You heard him ask him to take his hands out of his pockets three times, and then you heard him scream "Don't move. Don't move"?

A. That's correct.

Q. And then you saw him pull out his gun?

A. Yes, ma'am.

Q. Did you see him hand cuff Mr. Sutherland?

A. Yes, ma'am.

Q. Did you see him pull his arms behind his back and put the hand cuffs on him?

A. Yes, ma'am, I did.

Q. You saw him sit him down in the bank lobby in a chair?

A. I saw him sit down in the bank lobby in a chair, yes, ma'am.

Q. And at that point in time, did this officer come into your office and look or do or say anything to you?

A. Yes, ma'am.

Q. What, if anything, happened at that point?

A. I showed him the teller tape and the checks, and I told him of the conversation that we had about 15, 20 minutes earlier, prior to that. Then the police officer took over the investigation at that point.

Q. You told this Birmingham police officer about

the conversation that you had with Mr. Sutherland?

A. That he had come in, and we had discussed the items, yes, ma'am.

Q. And did you tell this Birmingham police officer that Mr. Sutherland had denied any knowledge of these checks?

A. I just basically explained to him the checks and the teller tape, and he handled everything else. That's all I know.

Q. My question to you was, did you tell this Birmingham police officer that Mr. Sutherland had denied any knowledge of these checks?

A. I don't remember if I did or not, ma'am.

Q. Prior to -- let me withdraw that.

How long did you observe Mr. Sutherland sitting in the bank lobby with his hands cuffed?

A. It was about 15 or 20 minutes.

Q. Was he sitting in a chair with his hands cuffed behind his back like this (indicating)?

A. Yes, ma'am.

Q. Did you have customers in the bank that afternoon?

A. We did have a few customers, yes, ma'am.

Q. Do you recall what day of the week that was?

A. I believe it was on a Friday.

Q. As the customers came into the bank, could they see Mr. Sutherland sitting there in a chair with his hands cuffed in the lobby?

A. Yes, ma'am, they could.

Q. Yes, they could?

A. Yes, ma'am.

Q. After this 15 minutes or so elapsed, did you see the police put Mr. Sutherland -- take him outside hand cuffed?

A. Yes, ma'am.

Q. Did you observe whether or not they put him in a patrol car and took him off?

A. I believe they did, yes, ma'am.

Q. Is this -- let's back up just a few minutes. Before this individual came to the door of your office and you were on the phone with Shawn Rankin, were there any other police officers in the bank?

A. Not until a few minutes later. Then there were some uniformed officers to arrive.

Q. And did they arrive after this Birmingham police officer had hand cuffed Mr. Sutherland?

A. Yes, ma'am, I believe so.

Q. Now, do you know what time of day this took place?

A. It was late afternoon. I don't remember the

time.

Q. Did you see any weapon on John Sutherland at that time?

A. No, ma'am, I did not.

Q. Did you see any weapon on John Sutherland any time that day?

A. No, ma'am, I did not.

Q. And what was this gentleman who identified himself as a Birmingham police officer wearing?

A. I think blue jeans and a T-shirt or something like that.

Q. Was he wearing a uniform?

A. No, ma'am.

Q. At any time prior to June the 27th, 1997, have you spoken with any other law enforcement officers about these two checks?

A. Yes, ma'am, I have.

Q. And who was that?

A. Investigator Shawn Rankin and Investigator Rick Icorn of UAB.

Q. Have you spoken with them on the telephone, or had you spoken to them in the bank?

A. They had come in the bank in person to discuss a fraudulent ring that was going around Birmingham cashing bad checks on this particular

account.

Q. All right. Before June the 27th, 1997, had you spoken to any law enforcement officer about John Sutherland in connection to these two bad checks?

A. I did talk to -- it may have been the day or two before we had gotten these checks back, and I had talked to both Officer Icorn and Officer Rankin at UAB about the checks and that I had -- was going to try to talk with Mr. Sutherland to find out about the checks. And that was pretty much it.

Q. All right. Is it your testimony today that before June the 27th, 1997, you had given some information to Rankin and Icorn at UAB Police Department about Mr. Sutherland?

A. That I had told him that these checks were tendered within this particular transaction with that $50 check, and I was going to try to talk with him to find out more about these checks.

Q. All right. Let me ask -- do you remember when I took your deposition on November the 9th, 1999?

A. I remember. I was there for a long time, yes, ma'am.

Q. Let me ask you to read the question on page 125, beginning at line 17, and your answer?

A. "Have you given the police any information

regarding Mr. Sutherland prior to June 27th?"

Q. Just slow down and read the question out loud.

A. "Had you given the police any information regarding Mr. Sutherland prior to June 27th of '97," and I said, "No, ma'am."

Q. Okay.

MS. COLE: Your Honor, may I confer just a moment with Mr. Spencer?

THE COURT: Sure.

Q. (By MS. COLE) Came in while you were talking to Shawn Rankin, that he identified himself as a Birmingham police officer. Did he tell you his name was Michael Wooten at that point?

A. We didn't get into all that, no, ma'am.

Q. And at some other point in time, did he identify himself as Michael Wooten?

A. After all the happenings of that event took place, yes, ma'am, he did let me know who he was.

Q. But just so we're clear, while you are on the phone with Shawn Rankin, this individual in plain clothes, for lack of a better expression, came to the door of your office and identified himself as a Birmingham police officer; is that correct?

A. Mr. Rankin was on the phone with me. He told

me help was on the way. This guy came straight to my office. I assumed that this was the help he was talking about.

Q. Okay. Did you not just tell the jury that he said, "I'm a Birmingham police officer"?

A. Ma'am, I'm sorry if I said that.

Q. And I may have misunderstood you, so just so we're clear?

A. I was assuming this man that came into my office was the help I needed.

Q. All right. At some point in time, did you hear him tell Mr. Sutherland he was a Birmingham police officer?

A. I believe there was some point in time there when he was trying to apprehend Mr. Sutherland that he did let him know he was a police officer. It just all happened so quickly.

Q. I understand. At any time that day on June the 27th, 1997, whether it was the first time or the second time Mr. Sutherland was in the bank, did he ever make any physical threats against you or anybody else in the bank?

A. Prior to this date?

Q. June the 27th, 1997. Whether he was in the bank the first time or the second time, did he make any

Q. Was Mr. -- did Mr. Sutherland appear to be angry when you were talking to him?

A. The first time when he came into my office, he was very surprised. And, you know, that's basically all I can say is that he was very surprised, and he had never seen the checks before, and there wasn't much said basically. He didn't know the checks. He had never seen them before, and, you know, it didn't really lead me where I needed to go with the investigation, so, you know, he was able to leave on his own.

Q. The second time he came in -- by the way, how

long was it before he came back the second time?

A. It was probably about ten minutes.

Q. He leaves. Comes back ten minutes later?

A. Yes, sir.

Q. Did he appear to be angry when he came back the second time?

A. Yes, sir, he was.

Q. Was he red-faced?

A. He was upset.

Q. I believe in your deposition you said his face was turning red?

A. Yes, sir.

Q. And he came in and said, "I'm mad"?

A. "I'm mad, and I want to see you right now."

Q. Now, what were you doing at that time?

A. I was on the phone with Investigator Rankin.

Q. Tell me about the conversation you had with Investigator Rankin.

A. I basically told Investigator Rankin that I just met with the customer, and he had never seen the checks before. I told him I really didn't know if he did it or not. That was my words to investigator Rankin. And then while I'm on the phone with Investigator Rankin, Mr. Sutherland comes in, and he's able to hear on the phone those words that were spoken

A. No, sir.

Q. Did he say it one more time?

A. Yes, sir, he did.

Q. What did he say?

A. Get your hands out of your pocket.

Q. Did Mr. Sutherland get his hands out of his pockets?

A. No, sir, he did not.

Q. Did the officer draw his weapon?

A. Yes, sir, he did.

Q. All right. By the way, you don't know what the conversation was between Mr. Rankin and the City of Birmingham, do you?

A. No, I do not.

Q. Because you weren't on the phone with them?

A. No.

Q. Okay. Now, when the officer draws his weapon, what does Mr. Sutherland do after disobeying him three times?

A. He's very scared and surprised that a weapon has been pulled, you know, you see that in his face.

Q. And what does he do?

A. I believe he did take his hand out of his pocket.

Q. Finally took his hand out of his pocket. Did

he put his hands up against the wall?

A. I don't remember. At that point I was kind of in shock myself.

Q. You don't remember what happened with Mr. Sutherland. You don't remember if he put his hands on the wall?

A. I don't remember what transpired -- I can remember hands going up, and I think the police officer frisked him, but as far as in detail, I can't describe what occurred.

Q. Did a second officer come into the bank uniformed?

A. There were like two uniformed officers to come in.

Q. They came in?

A. Yes, sir.

Q. I think you said they came in some time shortly thereafter?

A. Yes, they did.

Q. Okay. Would you be surprised if there's testimony that says one of the second officers put the hand cuffs on Mr. Sutherland?

MS. COLE: Your Honor, I'm going to object. Assuming facts not in evidence at this point.

THE COURT: Sustained.

Q. (By Mr. Love) Are you absolutely sure that it was Officer Wooten that put the hand cuffs on Mr. Sutherland?

A. I believe it was him. I believe he did put them on.

Q. But are you absolutely sure?

A. I'm not absolutely sure --

MS. COLE: Your Honor, objection. Asked and answered.

THE COURT: Overruled.

Q. (By Mr. Love) But you're not absolutely sure; correct?

A. I'm thinking that Officer Wooten was the one that put the hand cuffs on him.

Q. You're thinking that?

A. I can't say I'm absolutely sure, but I believe it was him.

Q. Okay. Did you speak with Officer Wooten after Mr. Sutherland was hand cuffed?

A. Yes, I did.

Q. By the way, Mr. Sutherland was sitting down in the lobby?

A. Yes, sir.

Q. Okay. At some point, did Mr. Sutherland say, "I'm uncomfortable"?

Q. Just wanted to make sure. At some point you gave a statement to Officer Wooten; correct?

A. Yes.

Q. All right. And it was while Mr. Sutherland was still in the bank; correct?

A. No.

Q. It was after Mr. Sutherland --

A. After he.

Q. -- had been taken away?

A. After he was gone, yes.

Q. And you gave this statement, and I believe in

THE COURT: Anything else?

MS. COLE: I do have some redirect. It's probably going to be about 10 or 15 minutes.

THE COURT: Well, I was trying to avoid bringing him back.

MS. COLE: I know that the Court had another matter. That's why I wanted to be as honest as I possibly can. I don't think I can do it between two or three minutes.

THE COURT: And you'll have some after that counsel, probably?

MR. LOVE: It depends on her questions, Your Honor.

THE COURT: Well, let's try to get what we can in by a quarter till. See what we can do by that.

REDIRECT EXAMINATION

BY MS. COLE:

Q. Mr. Renda, I'm going to try to make this as quick as possible for everyone this afternoon, and let me ask you, sir, in response to your last questions, and after I'd asked you about the hand cuffs, you told Mr. Love that you weren't sure or you believed that Mr. Wooten was the one that hand cuffed Mr. Sutherland; is that correct?

A. Yes, ma'am.

Q. Okay. Same deposition, November 1999, about some 14 months ago. Look on page 138 at line 20. What was your answer?

A. I said, "Yes. I saw him put the hand cuffs on Mr. Sutherland."

MR. LOVE: What page was that again?

MS. COLE: Page is 138.

Q. You're not saying anything different today than what you said in November 1999 at your deposition, are you?

A. No, ma'am, I'm not.

Q. And you testified in response to Mr. Love's questions that at some point in time, Mr. Sutherland apparently indicated that the hand cuffs, after sitting in this chair, the officer allowed him to stand up?

A. That is correct.

Q. But he was still hand cuffed?

A. Yes, ma'am.

Q. Still in the lobby of the bank?

A. Yes, ma'am.

Q. On Friday afternoon?

A. Yes, ma'am.

Q. Did Officer Rankin tell you to stall Mr. Sutherland until the police got there?

A. No, he did not.

Q. Now, Mr. Love asked you some questions and said that -- and you said that this individual who didn't really identify himself as a Birmigham police officer to you --

A. No, ma'am.

Q. -- turned around and told Mr. Sutherland, said, "Get your hand out of your pocket. Get your hand out of your pocket. Get your hands out of your pocket," three times?

A. Yes, ma'am.

Q. And at some point in time he identified himself as a Birmingham police officer?

A. Yes, ma'am.

Q. And pulled his gun on Mr. Sutherland?

A. Yes, ma'am.

Q. And just so we're clear, did you see this individual twist Mr. Sutherland's arms behind his back as he slapped those hand cuffs on?

MR. LOVE: Objection.

THE COURT: Overruled.

A. I saw him put his hand behind him, yes, ma'am.

Q. (By MS. COLE) One officer there, one individual there?

A. Yes, ma'am.

Q. No uniforms at that time? No uniformed officers at that time?

A. No, ma'am.

Q. Now, Mr. Love asked you some questions about this statement that you gave to Officer Wooten, and you told him that you gave this statement after Mr. Sutherland had been taken away in the patrol car?

A. Yes, ma'am. Actually the officer wrote that down after I had spoken to him. He sat down and wrote that out.

TRIAL TESTIMONY

JOHN CHARLES SUTHERLAND

Q. All right. And tell the jury who your children are.

A. I have a nine-year-old son, John Oliver Sutherland.

Q. And do you have custody of your son?

A. Yes.

Q. Do you have any hobbies?

A. Well, yes.

Q. All right. Would you tell the jury what those hobbies are?

MR. LOVE: Your Honor, I'd object to relevancy at this point.

THE COURT: What are you bringing?

MS. COLE: We'll move on, Your Honor. I'll withdraw the question.

Q. In June -- let me withdraw that. Prior to June of 1997, John, were you a customer at Colonial Bank?

A. Yes.

Q. And how long as of June of 1997 had you been a Colonial Bank customer?

A. I had been doing business with Colonial Bank off and on for over ten years.

Q. Did you have any bank accounts in June of 1997 with Colonial Bank?

A. Yes.

Q. And please tell the jury what accounts you had.

A. Well, I had my business account with Colonial as well as a personal account. I had an outstanding loan at Colonial Bank. They had given me the loan to start my business with.

Q. And which branch had you originally set up your accounts at?

A. At that time, I had set up my business account with the Southside Colonial. I believe it was my branch that I started the account with.

Q. And is that the branch that was located on 18th Street South?

A. That would be correct.

Q. Did you, in 1997, did you go into the branch there on 18th Street South on a regular basis?

A. Well, yes.

Q. Do you have a judgment or a recollection as to how many times in a typical month you would go into the bank?

A. Well, a few times a week hopefully if we were getting any money in, and I could make deposits, but typically, two or three times a week, normal.

Q. Prior to June 2nd, 1997, did you know the

branch manager, Mark Renda?

A. No.

Q. On June the 2nd, 1997, did you have an occasion to go to Colonial Bank on 18th Street South?

A. What day again?

Q. On June 2nd, 1997?

A. June 2nd. I went by the bank. I believe I went through the drive-through on that day.

Q. Let me ask you to take a look at what we've previously marked as Plaintiff's Exhibit No. 1 and see if you can identify No. one?

A. Well, yes.

Q. All right. What is that?

A. It's a check written to cash on my account or my Environmental account, probably for some petty cash for only $50.

Q. What's the date on that check?

A. 6/2/97.

Q. Is that a copy of the check that you cashed at Colonial Bank on June the 2nd, 1997?

A. That appears to be the copy.

MS. COLE: Offer Plaintiff's Exhibit No. 1.

THE COURT: Admitted.

(Plaintiff's Exhibit No. 1 was received into evidence.)

Q. (By Ms. Cole) Do you have the original cancelled check?

A. I don't think I was able to find it, no.

Q. Did you tell us that you went inside or through the drive-through on June the 2nd?

A. I recall going through the drive-through.

Q. Between June the 3rd, 1997, and June the 27th, 1997, do you recall if you went to Colonial Bank for any reason?

A. Yes, I would have continued to go as I had always gone, maybe a few times a week, routine business.

Q. From June the 3rd, 1997, to June the 27th, 1997, did anyone from Colonial Bank contact you by phone or by letter?

A. No.

Q. Did you have any contact with anybody for any reason with Colonial Bank from June the 3rd until June the 27th, 1997?

A. I don't even recall if the bank's statement would have came out in that period, so no, I think not.

Q. On June the 27th, 1997, did you have occasion to go to the bank there on 18th Street South?

A. On the June 27th? Would you repeat that, please?

Q. June the 27th, 1997?

A. Yes. Yes.

Q. I'm sorry. I'm having difficulty talking. Do you recall what day of the week June the 27th, 1997, was?

A. Yes. It was Friday. I was wanting to go out of town that weekend with my boy.

Q. And do you recall what time of day you went to the bank?

A. It was the afternoon, about 3:00 o'clock.

Q. And was anybody else with you?

A. No.

Q. I may have asked you this. Did you go inside or to the drive-through?

A. I went inside.

Q. And what did you do when you got inside the bank?

A. I went into the bank to cash a small check and to make a loan payment at which time the teller told me she was unable to cash my check and that I needed to talk to the branch manager.

Q. And what, if anything, happened after that?

A. Then I proceeded over to the branch manager's office. He met me and escorted me into his office and began to talk to me about some fraudulent checks that I knew nothing about.

Q. What did he say to you at that time?

A. Well, he wanted to know what I was going to do about it. He showed me some checks, a lot of money. All I saw really was about $500 worth of checks. He claimed that I had passed these two stolen checks onto the bank and demanded to know what I was going to do about it. He let me know that the bank was going to get their money and began to ask me other questions, if I knew the people's names on the check. Just asked me questions like that, what did I know about it, what was my involvement, what was I going to do to repay the bank.

Q. Let me ask you to take a look at Plaintiff's Exhibit 3 and 4 and see if you recognize these documents?

A. Well, I recognize these now as the checks that this issue is about. I didn't recognize them at the time.

Q. Are these copies of the checks that he showed you that day on June the 27th, 1997?

A. I have to assume that it would be because I really had not seen these checks before then, and only at these proceedings have I ever seen these checks.

Q. Do you know Tyrone T. Clayton?

A. Absolutely not.

Q. Do you know an L. Brock?

A. No.

Q. Do you know a Mary Hancock?

A. No.

Q. Do you know Nena Renda?

A. No, ma'am.

Q. Did you make any statements to Mark Renda concerning these checks?

A. In my defense, I protested I knew nothing about these checks and the people that were involved. I did not have the money.

Q. And what happened next?

A. He said that I could go, but that I would continue to be -- that I could go. He just said that I could go, and they'd be back in touch with me about this matter.

Q. Now -- and did you leave the bank?

A. Yes.

Q. Had you cashed your check before or after you went to Mr. Renda's office?

A. Well, he went ahead and let me cash the check then after I left his office and made my loan payment.

Q. So they accepted your loan payment; let you cash a check?

A. Yes.

Q. Now, what happened next?

A. Well, I had some mail to drop off before I left town, small postbox down on 21st Street, so it was convenient for me to drop it off on my way out of town. But it began to bother me. I'm a small business man, and even a $500 --

MR. LOVE: Objection. Your Honor, not responsive to the question. I believe the question was "What happened next?"

A. Thank you.

THE COURT: So, based on responsiveness?

MR. LOVE: Yes, Your Honor.

THE COURT: For that reason, overruled. Only the person asking question has the standard for objecting on responsiveness.

MR. LOVE: Objection, irrelevant, Your Honor.

THE COURT: Overruled on that too.

Q. (By Ms. Cole) Go ahead.

A. As I dropped the letters in the postbox, I began to realize that if the bank drafts the money out of my account, well these bills are going to bounce, and I decided I'd better go back to the bank and make very sure of what their intentions were because if they drafted it out of my account, I was really going to have some problems.

So I decided to come back to the bank to make sure I understood what the bank's actions were going to be over the next few days.

Q. All right. And did you go back to the bank?

A. Well, yes, I went back into the bank.

Q. Approximately how long from the first time you left to the second time you came back to the bank?

A. It could have been 10 to 15 minutes because it was just a few city blocks.

Q. And when you got back to the bank, what did you do?

A. I then went to Mr. Renda's office. And outside the door, I saw he was on the telephone.

Q. What happened next?

A. I told Mr. Renda I needed to talk to him, and he was on the phone, so he stayed on the phone.

Q. Did he say or do anything at that time?

A. Just gave me a finger like one minute.

Q. Then what --

A. Didn't say anything to me.

Q. All right. Then what did you do?

A. Well, I stood outside the office door and outside the office area in the lobby, sat there waiting. I could see into his office because he had sort of a glass -- half wall, half glass. I could see him on the

telephone, so I stood outside his office waiting for him to get off the phone.

Q. Could you hear his conversation?

A. No.

Q. And how long did you stand outside the office?

A. It must not have been very long, a few minutes.

Q. And what happened next?

A. Well, I was -- as I was standing there, and the best I recall, it seems like a uniformed officer of some type, security, UAB, I'm not sure, but some officer came in, but he walked past me and went back and stood in the lobby area.

And then, I guess within a minute or so, a scruffy-looking guy comes walking in. He walks past me. He goes to the office of Mr. Renda's, more or less at the door in the office. I really wasn't focussing on him and then comes back out of the office, and as he comes walking -- he had a fanny pack on, and he comes walking out of the office, he sort of fumbles around in his fanny pack and sticks his pistol in my face, says, "Freeze. Don't move. Birmingham police." And I have a large bole automatic pistol about this far (indicating) from my face.

Q. Did he say anything else to you at that time?

A. Well he keeps shouting. "Don't move. Don't move. Put your hands up. Don't move." I was standing there casual when he came in. I had one hand in my pocket as -- that's the way I was standing. The other one was here. I start trying to pull my hand out of my pocket. He says, "Don't move your hand out of that pocket. Don't move." Just screaming at me. And, of course, I think I'm about to get shot. And I'm not sure exactly what to do. All I see really is that gun.

So he continues to yell, "Don't move. Don't take your hand out of that pocket" because he probably thought I had something. I don't know.

So then the officer comes over to me, and he's got this gun in my face. He comes around to me and takes my hand out of my pocket for me, and he begins to twist my hand behind my back rather excruciating. Now he's got me back here. I'm not going anywhere. Bank lobby, all kind of people coming in. He's got me twisted up like this (indicating.) I'm not sure how he does it then. He has me put my hand up. Then he takes his other hand in front of me or behind me. I'm not sure how he did it. But he got my other hand then behind me.

This officer rachetted this one down. I

immediately feel the pain. I mean he put this one on me. He's got my arm twisted so bad, I'm not doing anything but feeling the pain.

Q. Let me stop you right there and let you back up a minute. When you say you saw some type of uniformed officer while you were standing there in the lobby, do you know who that was?

A. Well, no. No, I do not.

Q. Do you know if it was a Birmingham police officer?

A. No. I couldn't identify the uniform. Wasn't really focused on him.

Q. Do you know if it was a UAB officer?

A. I couldn't be sure one way or the other, but he didn't interfere --

Q. Do you know if it was a security guard?

A. I couldn't say. The uniform was unremarkable.

Q. Did he say or do anything to you?

A. No.

Q. Then you told us that this scruffy-looking guy came in?

A. Yes.

Q. And that he walked past you?

A. Yes.

Q. All right. Where did he go?

A. Well, he went to Mr. Renda's office, the branch manager's office.

Q. Let me ask you this: Did you see him go into Mr. Renda's office and go up to his desk?

A. I don't think he went up to his desk. He just sort of went into it.

Q. How long was he in Mr. Renda's office?

A. Briefly. Just a second or two.

Q. All right. And did you see -- do you know if they had a conversation?

A. I didn't hear one.

Q. Did you see this individual look at anything in Mr. Renda's office, anything that was on his desk or anything in his hand?

A. Well, I didn't see it. Now, I wasn't really looking at them that much, but no, I didn't see anything of that sort.

Q. And let me ask you, this man, that scruffy-looking man, what was he wearing?

A. He had like a sweatshirt on, some kind of jogging pants, fanny pack, tennis shoes.

Q. Didn't have on a uniform?

A. No, ma'am.

Q. All right. And after he spent this brief

time in Mr. Renda office, a few seconds, you said, he came out and pointed his gun at you. Did you see any other officers in the bank?

A. Well, after he had cuffed me, then out of my peripheral vision, I could see squad cars pull up, and I think several officers entered the bank within a few minutes after him cuffing me.

Q. Well, let's back up again. What were you wearing that day?

A. I was casual dressed. It's Friday, and I had on blue jeans and a T-shirt. It was hot, summer.

Q. Did this officer -- excuse me. Did this individual ever tell you before he walked into Mr. Renda's office that he was a Birmingham police officer?

A. Well, when he pulled the gun and stuck it in my face, he began to identify himself.

Q. Before he walked into Mr. Renda's office?

A. No. No.

Q. Did he ever show you his badge?

A. No, I think not.

Q. When he pulled his gun and pointed it at you, did you know he was a Birmingham police officer?

A. Well, not at that instant.

Q. Now, then you told the jury that he hand

cuffed you?

A. Yes.

Q. Are you positive that it was this individual who hand cuffed you?

A. Well, yes, that's what I recall.

Q. Then what happened?

A. He had me hand cuffed, both hands behind my back. And then an officer, uniformed officer then got on either side of me, and they sat me down in a chair in the lobby on display.

Q. Were there any other customers or any other people in the bank at that time besides the police officers and you and Mr. Renda?

A. Yes. It was a Friday afternoon. When it first happened, the bank was full of people.

Q. And you said these two uniformed officers then got on either side of you, and what happened next?

A. Well, they sat me down in a chair. And the hand cuffs and the position I was in was excruciating. So, I begged them to loosen the cuffs. They wouldn't do it. Then I finally asked them if I could stand up to take some of the pressure off because I had big hands, little overweight at the time too, high blood pressure. I had some problems. I needed to get some relief.

Q. All right. How long did you sit in that

chair or stand against the wall hand cuffed?

A. Oh, gosh. It was a good 20 minutes.

Q. All right. And what happened next?

A. Well, then they escorted me out to the squad car and placed me in the back of the car and took me on to the downtown precinct, I assume it was.

Q. When they escorted you out to the squad car, were you still hand cuffed?

A. Yes.

Q. Were there still people in the bank?

A. Oh, yes. I'll always remember the look on the people's face.

Q. And when they put you in the squad car, were you still hand cuffed?

A. Yes.

Q. When they got you downtown to the headquarters, were you still hand cuffed?

A. Yes, and I was begging the officer the whole time to release those cuffs. I knew something was going wrong.

Q. From the time you got to headquarters, did they ever take the hand cuffs off?

A. Not until after some period of interrogation.

Q. Approximately how long a period of time are we talking about, when you got to the headquarters until

A. Well, they brought me into a room upstairs where after I sat there for a long time, a detective came in to interrogate me. He read me my rights, let me know I was under arrest.

Q. I'm sorry to jump around, but let's go back to the bank for a minute. After you were hand cuffed and you were in the lobby, did you see this individual, who eventually identified himself as a Birmingham police officer, did you see him go into Mark Renda's office and look at any documents?

A. Well, they had brought me over by a window, but I know he went over to Mr. Renda's office after they cuffed me. I didn't know what they were looking at. I didn't hear the conversation.

Q. And you told the jury you were in that lobby hand cuffed, either sitting or standing, for approximately 20 minutes before they escorted you outside and put you in a squad car; is that correct?

A. That's correct, yes.

Q. Now, let's go back to police headquarters. Do you know who interrogated you?

A. I don't know. Didn't know him.

Q. Was it this same individual who pointed his gun at you?

A. No.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
(CIVIL DIVISION)

JOHN SUTHERLAND	)	
	)	
Plaintiff,	)	
	)	Case Number
vs.	)	
	)	CV-98-7553-TMS
	)	
COLONIAL BANK,	)	
THE CITY OF BIRMINGHAM et al.	)	
	)	
Defendants.	)	

AFFIDAVIT OF MICHAEL WOOTEN

Before me, the undersigned Notary Public in and for said County and in said State, personally appeared Michael Wooten, who is known to me, and who being by me duly sworn deposes and says as follows:

My name is Michael Wooten. I am a resident of Shelby County and I am over the age of 19 years old. At the time of the signing of this affidavit I am in Jefferson County, Alabama. I am competent to testify and do testify upon personal knowledge to the following:

I was employed by the City of Birmingham Police Department for twenty one years. On June 27, 1997, I was employed with the City of Birmingham Police Department.

I, like all Birmingham police officers, was screened for my fitness as a good,

decent and professional peace officer. I went through an extensive period of training at the Birmingham Police Academy where I was taught how to professionally do my job and respect the constitutional and statutory rights of the persons with whom I came into contact. I was also taught the specific policies of the City of Birmingham Police Department with regard to proper arrest procedures and use of force to effect an arrest. I was taught to use only such force as is reasonably necessary to effect a lawful arrest. I was given a book containing the rules and regulations of the Birmingham Police Department. These rules and regulations are the official policies of the Birmingham Police Department in such areas as arrest procedure and use of force, whether lethal or nonlethal. The rules and regulations cover proper use of handcuffs. They covered the proper use of mace, batons and firearms. The courses taught at the Police Academy was led by veteran police officers and other trained professionals. The training at the Birmingham Police Academy conforms with the standards for police training recognized by state agencies and national accrediting organizations. In fact an officer cannot be sworn in as a peace officer unless the training given to him conforms with the requirements of Alabama Peace Officer Standards and Training Commission. Each and every police officer on the City's police force, including myself, was certified by this commission. On June 27, 1997, all sworn Birmingham police officers, including myself, were certified.

Officers in the City of Birmingham Police Department are supervised by a chain of command of experienced superior officers which ended with the police chief. Additionally

civilian authority over the police department exists in the person of the Mayor of the City of Birmingham. For the officer just out of the Academy, training continues in the form of a Field Training Officer. This experienced veteran monitors and instructs the recruit in an on the job setting regarding the rules and regulations, policies and procedures of the City of Birmingham. The Field Training Officer fills out evaluation forms on the officer under his supervision so that his or her strengths and deficiencies can be recognized. After the officer has completed several weeks on the "training car" he remains directly supervised by a patrol sergeant. The next officer in the chain of command is the shift lieutenant. Each Precinct, where patrol officers are assigned, is commanded by a Captain. Above the rank of captain are several deputy chiefs, including a deputy chief of patrol. All these supervisors and the chief of police provide supervision of patrol officers. This chain of command existed and was in effect on June 27, 1997.

On June 27, 1997, it was the policy of the City of Birmingham Police Department to observe scrupulously the rights and dignities of each and every person departmental personnel came in contact with. This included not using excessive force, not falsely arresting persons, not assaulting nor battering, not falsely imprisoning persons, not maliciously prosecuting persons, not trespassing or in any way violating the rights, privileges and immunities of any person.

Furthermore, the City of Birmingham, did not and does not have a police, custom or practice of violating anyone's Constitutional rights. I received this training.

I observed John Sutherland in Colonial Bank on June 27, 1997, in Birmingham Alabama. I responded to a dispatch call concerning a possible felony at Colonial Bank. I was informed by police dispatch that a person was attempting to pass fraudulent and forged checks at Colonial Bank. I was further informed that the suspect was at the bank. I went to the Colonial Bank and saw Mr. Sutherland in the lobby of the bank. I walked passed Mr. Sutherland and found the bank manager. I investigated the matter. I questioned the bank manager about what was going on. The bank manager told me that Mr. Sutherland had within the past two weeks cashed a fraudulent or stolen check and had returned to the bank with another check that he suspected was fraudulent or stolen. The bank manager showed me what he reported as a forged or fraudulent check that had been cashed by the suspect. I asked the bank manager if Mr. Sutherland was the person suspected of passing the fraudulent or forged check. The bank manager, Mark Renda, pointed out Mr. Sutherland as the suspect.

I approached Mr. Sutherland and told him to put his hands on the wall. I drew my gun to effectuate the arrest of this felony suspect. At all times I was concerned about my safety, the safety of the suspect and the safety of all persons in the bank. I was the only police officer in the bank at the time I drew my weapon to apprehend the suspected felon. At no time did I use excessive force nor harm the suspect. Mr. Renda signed a sworn police report, concerning this incident and what he told me, which I have attached to this affidavit.

At all times during my contact with Mr. Sutherland I acted under my lawful discretion as a police officer and I believed I had probable cause to take the actions I took toward Mr. Sutherland. At no time did I witness any officer act inappropriately or violate Mr. Sutherland's rights. I scrupulously protected the rights and dignities of Mr. Sutherland. This included not using excessive force or assaulting Mr. Sutherland, not falsely arresting Mr. Sutherland, not falsely imprisoning Mr. Sutherland, not maliciously prosecuting Mr. Sutherland, and not trespassing or in any way violating the rights, privileges and immunities of Mr. Sutherland.

In addition to performing all my actions relative to Mr. Sutherland as a police officer, I also state that I nor any other officer violated any of Mr. Sutherland's rights, privileges or immunities. We performed all our duties and took all our actions relative to Mr. Sutherland in good faith and in the good faith belief that they were constitutional.

MICHAEL WOOTEN

Sworn to and subscribed before
me on this the 8th day of January, 2001.

Notary Public

My Commission expires 1/6/2002

TRIAL TESTIMONY

MICHAEL WOOTEN

Q. Officer Wooten, could you state your name for the record?

A. My name is Michael Wayne Wooten.

Q. Officer Wooten, were you employed by the City of Birmingham in 1997?

A. Yes.

Q. About how long have you been employed around that time?

A. A little over 19 years, I think.

Q. And you were employed as what?

A. At that time, I was assigned to the South Precinct Burglary Task Force.

Q. You were employed with the Birmingham Police Department; is that correct?

A. Yes.

Q. Do you remember an incident on June 27th, 1997, at Colonial Bank?

A. Yes, sir.

Q. Could you tell me what made you aware of that June 27th, 1997, incident at Colonial Bank?

A. Yes, sir. A call went out over the police radio. The dispatcher gave out a single at Colonial Bank of a suspicious person, and so I told the dispatcher that I would respond. I was one of the units that responded on that call.

about forgery, you had not arrived on the scene yet?

A. No, sir, I had not yet arrived.

Q. What were you wearing that day, Officer Wooten?

A. A pullover shirt, blue jeans, tennis shoes, and a fanny pack.

Q. Okay. And I believe you said it earlier, but let me make sure. What unit were you in -- when I say "unit" --

A. Well, I was in Unit 346. It was in an unmarked old B84 tan car that I don't even remember the brand of, but it was an unmarked unit.

Q. Let me clarify. You were in the burglary unit or division at that time?

A. I was assigned at the South Precinct Burglary and Task Force. Our job was to investigate, primarily investigate burglaries. And we also were to respond to felonies in progress, and we also arrested felons on outstanding warrants.

Q. You came to the bank?

A. Yes.

Q. All right. What happened when you entered the bank?

A. I went into the lobby and was directed to the manager. I asked him what he had.

Q. Did you go into the manager's office?

A. Yes. Yes.

Q. Okay.

A. I went into the manager's office.

Q. Did you speak with the manager?

A. Yes.

Q. Do you recall how long it was you spoke with the manager?

A. Not long. 30 seconds, maybe 45 seconds.

Q. Okay. What was said in that conversation with you and the manager?

A. Okay. He told me that there was an individual there in the bank that on prior occasions had cashed two stolen or forged checks. He showed me them. I said is he here now, and he pointed out Mr. Sutherland in the lobby. There was a glass partition there where you can, you could see into the lobby, and he said yes, that's him.

Q. Okay. Did you have your badge on at any time?

A. Yes, sir. I wore my badge. It was attached to a metal chain like this to a piece of leather, and you would keep it inside your shirt. And when you wanted to show your badge, you would pull it out, and it would hang here around your chest.

wall, which he did, and then I held that position, and he held that position until back-up units arrived.

Q. By the way, did you point the gun at Mr. Sutherland's head?

A. No, sir. I don't recall doing that. We're taught to aim center mask.

Q. Why do you aim center mask?

A. Well, it's where the organs are of the body where if you shoot somebody, you're more than likely going to stop them.

Q. Biggest part of the body; right?

A. Right.

Q. Because you're responsible for every bullet you shoot; isn't that correct?

A. Yes, sir.

Q. And the City of Birmingham requires you to find those bullets; isn't that right?

A. Yes, sir. And they train you to shoot center mask.

Q. That's right. You didn't shoot Mr. Sutherland, did you?

A. No, sir. I didn't shoot him.

Q. Why did you draw your weapon?

A. Because it was a felony arrest. They're always much more risky than a misdemeanor arrest.

There's so many intangibles involved. And I was by myself. My back-up units had not yet arrived. And so the safest way all around to insure that nobody gets hurt is to use your weapon.

Q. And is that within your discretion?

A. Yes, sir.

Q. As a police officer?

A. Yes, sir.

Q. Did you have your finger on the weapon?

A. No, sir. That's very risky. That's not permitted.

Q. Tell me why you didn't have your finger on the weapon.

A. Because if your finger is on your weapon all the time, the weapon may inadvertently fire. What you do, even when you're aiming your weapon, you're trigger finger is along the side of the weapon or the slide, as they call it. And only if you intend to use your weapon is when you actually place your finger on the trigger.

Q. Now, there's been a dispute about the hand cuffing. Did you hand cuff Mr. Sutherland?

A. No, sir. I've hand cuffed a lot of people before, but under those circumstances, I didn't. It just wasn't safe to do. I was by myself.

Q. Did someone else hand cuff Mr. Sutherland?

A. Yes, sir. When the back-up units arrived, they hand cuffed the suspect. Once he was hand cuffed, that's when I put my weapon away.

Q. All right. Did you transport Mr. Sutherland?

A. No, sir. A marked unit came to the scene. There were two patrol officers in uniform that transported the suspect.

Q. Would you ever let your hand cuffs leave you?

A. Well, there have been rare occasions, but this one didn't necessitate it.

Q. Okay. Isn't it the normal practice that if you hand cuff the person, you're going to go with your hand cuffs because you're responsible for those hand cuffs?

MR. SPENCER: Judge --

A. Yes.

Q. (By Mr. Love) Okay. Why wouldn't you transport Mr. Sutherland in that old beat-up car?

A. It was against department policy. Prisoners had to be transported in a marked unit that had a shield.

Q. Did that old beat-up car have a shield?

A. No, sir.

Q. You're cuffs never left you; right?

A. No, sir.

Q. Now, the person who did hand cuff Mr. Sutherland, was that person a Birmingham police officer?

A. Yes, sir.

Q. Absolutely. Did you see that person torque up Mr. Sutherland's arm in any way?

A. No, sir, I did not.

Q. Did you see that person trying to harm Mr. Sutherland in any way?

A. No, sir, I didn't.

Q. Did you see anything wrong with the hand cuffing procedure by that person against Mr. Sutherland?

A. No, sir.

Q. Okay. Now, after Mr. Sutherland was hand cuffed, what happened next?

A. He was taken to the patrol car where he was transported. I made out an incident report, and then I called the detective and spoke with him.

Q. Tell me, when you made out the incident report, did Mr. Renda sign the incident report, the bank manager?

A. Yes, sir. He was the one that gave me the information I needed regarding the checks and what not.

Q. Did you stay at the bank?

A. Yes, sir. I was there after I made out the

report for probably another 45 minutes to an hour.

Q. Okay. And Mr. Sutherland is gone by this point; right?

A. Yes, sir. He had already been transported.

Q. What did you do at the bank?

A. I went into a back room where the manager was at, and he was viewing camera film of where the tellers do their transactions, and he was attempting to find on the film where Mr. Sutherland had had a transaction with one of the bank tellers, and he informed me that there was a bank teller working there who had since very recently been fired that they suspected might have been involved in some hanky-panky there and might even have been connected to these checks.

And so I stayed there with him, and we looked at film of 45 minutes of transactions, and we never could find any. After that, I called the detective again, and I told him there was a possibility that they could have had a bank teller working there that had something to do with this and that Mr. Sutherland might not ~~even have~~ done anything.

Q. And Mr. Sutherland was released?

A. Yes.

Q. Did you ever have any other transactions with Mr. Sutherland?

use?

A. AR 15 Model 19, 11 A-1 Colt .45 automatic N79 grenade Launcher, Model 19.17 browning heavy barrel machine gun. 102 millimeter recordless rifle, AK.47 assault rifle, Oozey; FNFAL; MP .5 made by Heckburn and Cau; AR .15 M2s and the A1s. I've had training in numerous revolvers and semi-automatic hand guns. I've been trained in the use of hand grenades. I've been trained in the use of what they call the lightweight anti-tank weapons.

Q. That's the M.72 log that you've used?

A. Yeah.

Q. What type of weapon were you using on June 27, '97?

A. I was using a Model 26 Glock. They call it the baby Glock. It's a miniature version of their standard Glock of the standard semi-automatic hand gun that was 40 caliber.

Q. 40 caliber?

A. Yeah.

Q. Are you sure of the model number?

A. I believe it was a 26.

Q. It wasn't a 22 or 23 or 24 or 27?

A. It's possible, but I think it's a 26.

Q. If they don't make a 26 in a 40 caliber, you

whether the plaintiff or not knew this as opposed to the officer knowing it?

MR. SPENCER: Your Honor, in this situation, if I can make an offer of proof on this, when he pulls that weapon, there are certain parameters of when he can and can't pull his weapon is our position. And we're going into that at this time. You know, about how lethal the weapon is, what he's going to have to go through, we're getting to that. I just want to set the stage for the weapon that he pulled and pointed on the plaintiff here.

THE COURT: All right. Overruled.

A. Yes, sir --

Q. (By Mr. Spencer) If Glock says it takes about a half inch to pull the trigger to fire that weapon, would you agree?

A. That sounds appropriate I'd say.

Q. Did you prepare an affidavit at any time in this case?

A. Yes, sir.

Q. And you stated also you prepared a report; is that correct?

A. I filled out an incident report, yes, sir.

Q. And in your training that you received through the City of Birmingham, were you trained that it was important to put all critical information into your

reports?

A. Yes.

Q. And has anyone ever told you if it's not in the report, it didn't happen? Have you ever heard that expression?

A. I've heard that expression, yes. It is not a policy. It's an expression.

Q. In your affidavit, would you have put any critical facts regarding this incident in there?

A. In the affidavit?

Q. Yes, sir.

A. Yes, sir.

Q. When did you prepare that affidavit?

A. I'm not quite sure. A couple of years ago. I think this is drawn out over a pretty long time.

Q. When did you sign that affidavit?

A. I guess at the time I did it. I think it's been over a year.

Q. So you signed the affidavit over a year ago?

A. I believe so, yes.

Q. Was there a notary there that witnessed your signature?

A. No. Is this the same as the interrogatories? I'm getting a little confused. Is this what I mailed in?

Q. (By Mr. Spencer) Let me ask you to take a look at these —

MR. SPENCER: Your Honor, I'm withdrawing that.

Q. I'm just going to ask you to take a look at those.

MR. SPENCER: Judge, I object to the attorney approaching the witness while he's on the stand.

THE COURT: He's just seeing what's on the paper.

MR. LOVE: I believe I have a right to see the document that he handed —

THE COURT: Look at the document, and hand it back to the witness.

MR. LOVE: Okay.

(By Mr. Spencer) Mr. Wooten, do you recognize that affidavit.

A. Yes.

Q. And is that your signature?

A. Yes.

Q. And what's the date on that?

A. The 8th day of this month.

Q. Thank you. Did you prepare this affidavit?

A. No, sir.

Q. Did you type this affidavit?

A. No, sir.

Q. Are these words in this affidavit yours?

A. Verbatim, no, sir.

Q. So you didn't write this information out and someone type it for you? You didn't handwrite this or type it or anything?

A. No, sir, not to my knowledge.

MR. SPENCER: Your Honor, I'd ask if this be marked as Plaintiff's Exhibit 8.

(Plaintiff's Exhibit No. 8 was marked for identification.)

Q. (By Mr. Spencer) Mark this as Plaintiff's Exhibit 8, please.

Mr. Wooten, will you take a look at that, please. Do you recognize that document?

A. Yes, sir.

Q. And what is the document?

A. This is a Birmingham Police Department incident report.

Q. And this is the one you testified to on the record that you prepared on June 27, '97?

A. Yes, sir.

Q. Would you look on page 2 there. That's your name there at the bottom there; correct?

A. M. Wooten, yes, sir.

Q. And as I understand it, you wrote the account

out here, the narrative?

A. Yes, sir.

Q. And then Mr. Renda signed it?

A. Yes, sir.

Q. We'll come back to these in a little while.

THE COURT: Is that marked four?

MR. SPENCER: No, sir. Eight and nine.

MS. COLE: Nine, Your Honor.

MR. SPENCER: Nine is the last one.

(Plaintiff's Exhibit No. 9 was marked for identification.)

Q. (By Mr. Spencer) What I'd like to do again, were you trained by the City in the use of hand cuffs also?

A. Yes.

Q. And you were trained in the use of mislocks and other offense or defensive-type --

A. Yes, sir.

Q. -- movements? What type of nonphysical or the use of nonforce-type training did you receive?

A. Comealongs, mace.

Q. Mace is considered nonforce?

A. Oh, nonforce. There's no such thing as nonforce. We're not taught nonforce.

Q. So you weren't provided with any training or

persuasive measures other than the use of force?

A. You mean verbal commands and such as that? Yes, sir. I guess, yes, sir.

Q. Any type of psychology courses?

MR. LOVE: Your Honor, I'm going to object to irrelevant. Two, the plaintiff has not sued for failure to train.

MR. SPENCER: Judge, again, if I may make an offer of proof on this —

MR. LOVE: Your Honor, I'm going to object to any offers of proof at this point.

THE COURT: Okay. Overruled.

Q. (By Mr. Spencer) What type of training do you have in the use of nonforce?

A. Most of that was conflict revolution — excuse me conflict resolution for domestic violence situations.

Q. Other than that, did you receive any type of training?

A. No, sir. I don't recall getting training on verbal or nonforce.

Q. Okay. Are you familiar with the term "threshold inquiry"?

A. Excuse me?

Q. Are you familiar with the term "threshold

Q. And that was your testimony in your affidavit; is that correct?

A. Yes.

Q. And what -- specifically what constitutional and statutory rights of persons were you trained to respect?

A. Their right against unlawful search and seizure, their right to be unlawfully detained, their right against unlawful abuse, physical abuse.

Q. Any other type of constitutional or statutory rights you were trained on?

A. I'm sure there are. They do not come into mind right now.

Q. You testified earlier that on direct, that you pulled your weapon because this was a felony arrest; is that correct?

A. That's correct.

Q. And is it your understanding that you can pull your weapon on every felony arrest?

A. If I'm by myself, yes, sir. When I'm by myself, when I'm at a felony arrest, I pull my weapon.

Q. Is that what you were trained to do, or is that your personal understanding?

A. Well, that was one of the things covered in the street survival course that I took.

suppose to give the time.

Q. When you arrived at the bank, what was your understanding of what was happening at the bank?

A. At the time I arrived before talking to the manager?

Q. Yes, sir. When you pulled up to the bank.

A. That there was a suspect or suspects inside and that there was possibly a forgery, or ring as they called it, operating in there.

Q. Was that your only understanding of what was going on inside the bank at the time?

A. Well, that was all the information I had, so that was all I had to go by.

Q. Was there any information given to you that said there was a bank robbery in progress?

A. No, sir.

Q. Was there any information given to you that said there was an assault in progress?

A. No, sir.

Q. Or had occurred?

A. No, sir.

Q. Was there any information that said any type of violence was either in progress or had occurred?

A. No, sir.

Q. Was there any information that the bank

manager felt threatened?

A. No, sir.

Q. Was there any information that the bank manager had been attacked or was about to be attacked?

A. No, sir.

Q. Was there any information that said there was an armed person in the bank?

A. No, sir.

Q. Or had been an armed person in the bank?

A. No.

Q. And information as we heard it here, there was someone suspicious in the bank; correct, and they may be part of a check fraud ring; is that correct?

A. Yes, sir. When I arrived at the scene, that was the information that I had.

Q. And that's the same information you had when you prepared your affidavit too; is that correct?

A. As far as my arriving on the scene, yes. Am I permitted to look at this affidavit?

Q. You're welcome to look at it again, if you'd like?

A. Well, I think it'll make it easier if I have to refer it.

Q. Well, we'll take a break and let you look it over.

A. Is this the only one you have?

Q. It's not the only one I have. I want you to testify as to your recollection and what you recall. I don't want you to read that -- you can look at it and familiarize yourself with it. I'll be glad to let you do that.

A. Well, thank you. Let me go over it right quick.

(Witness reviews document.)

A. All right, sir. I think that'll be sufficient. Thank you.

Q. Thank you. When you got to the bank, what did you do? You walked into the bank; is that correct?

A. Yes.

Q. Who pointed out the manager's office to you?

A. I don't remember who pointed out the manager's -- I just know I found myself in the manager's office, and I spoke with the manager. I can't remember if I asked an employee where the manager's office is, or if I just walked into the office's areas and asked someone at that time.

Q. When you arrived at the bank, did you feel that it was a charged situation?

A. I didn't see anything going on at the time that would lend itself to that, no, sir.

Q. As you walked towards the bank manager's office, Mr. Sutherland was the only person standing outside the office; is that correct?

A. That's my recollection, yes.

Q. When you walked into the office, as the bank manager testified earlier that you didn't say anything, he'd be erroneous of that testimony; is that correct?

A. Yes.

Q. And if Mr. Sutherland testified that he didn't hear any conversation, your testimony is you had a conversation with the bank manager before arresting Mr. Sutherland; is that correct?

MR. LOVE: Objection -- withdrawn.

Q. (By Mr. Spencer) Did you, when you arrived at the bank and you saw Mr. Sutherland standing outside of the office, did he look suspicious to you?

A. No, sir.

Q. When you went over to the manager's office -- would you describe what the manager's office -- what the layout was, please.

A. I'll be honest with you. At this time, all I remember is it was rather small. That's all I remember.

Q. Do you recall it having a glass wall beside the door?

A. Yes, sir, I believe there was a glass wall o

a glass partition back between the manager's office and the lobby.

Q. Okay. So, as you approached the manager's office, you saw Mr. Sutherland standing there, and he didn't look suspicious; is that correct?

A. That's correct.

Q. And there was a glass wall, so you could look in there; is that correct? You could see into the manager's office before you got in there?

A. From the lobby?

Q. Correct.

A. Yes.

Q. What was the manager doing; do you recall?

A. No, sir. He was just standing by a table in the back area when I went back there.

Q. Did he appear to be threatened or look threatened in your analysis of the situation?

A. No, sir.

Q. Did anyone in the bank at that time appear to be in any type of fear to you or to be threatened?

A. No, sir.

Q. When you went into the bank manager's office, you didn't walk up to his desk, did you?

A. I walked up to him.

Q. Was he behind his desk or in front of his

desk?

A. I don't remember.

Q. Was he right inside the door?

A. Like I say, it was a small office, so it wouldn't be hard to be inside the door.

Q. Was he standing next to the door entryway; do you recall?

A. I just remember I went in the door, and he was inside. I don't remember if he was right next to the door or close.

Q. Was he anywhere close to Mr. Sutherland?

A. No, sir.

Q. Was he sitting down at his desk, using his phone?

A. No, sir. I don't believe he was on the phone.

Q. So you don't believe he was sitting down?

A. No. I don't remember him being sitting down.

Q. But you don't recall where he was standing around the desk?

A. No. I don't recall if it was behind his desk where he was standing or not.

Q. How long did you -- you claimed you had a conversation with Mr. Renda; is that correct?

A. Right.

Q. Before you arrested Mr. Sutherland?

A. That's correct.

Q. And I believe you testified earlier that conversation was about 30 seconds?

A. 30 to 45 I would guess.

Q. So, you recall this 30 or 45 seconds, but you don't recall where it occurred in the office?

A. What do you mean "where it occurred"?

Q. Did it occur over by the desk or over by the door or --

A. No, sir. I just talked to him inside his office.

Q. What information do you claim he showed you at that time?

A. He had a check or there might have been two of them that he showed me as evidence that he claimed Mr. Sutherland had cashed there at the bank for which no account existed. So, I know the evidence was a check -- I saw at least one check, perhaps two checks that he stated that Mr. Sutherland had cashed there.

Q. Was Mr. Sutherland's name on that check?

A. No, sir. It was somebody else's name.

Q. Was his account number on that check to your knowledge?

A. I don't believe it was.

Q. Was there any information at all on those checks to identify those to Mr. Sutherland?

A. No, sir.

Q. Did Mr. Renda tell you that Mr. Sutherland was there at the bank that day to cash some other fraudulent checks?

A. No, sir. I don't believe he thought probably or assumed that when he was back, he was going to cash another one.

Q. Well, I'm not asking you what he assumed. I'm asking you what he told you?

A. I don't believe he told me that he had cashed one of the checks, no, sir.

Q. I want to hand you back again your affidavit, the one that you signed on the 8th day of January, 2001. Turn to page 4, please. The first paragraph, about half way down, the sentence that starts "The bank manager told me," would you read that sentence?

A. "The bank manager told me that Mr. Sutherland had within the past two weeks cashed a fraudulent or stolen check and had returned to the bank with another check that he suspected was fraudulent or stolen."

Q. Does that refresh your recollection? Did he tell you that, or did he not tell you that?

A. Yes, sir. I believe he did, yes, sir.

Q. So you believe he did tell you he returned to the bank?

A. Yes.

Q. To cash another one?

A. Yes, sir.

Q. You put critical information in this police report; is that correct?

A. Yes.

Q. If you'd look over that police report, that's the one you prepared on the 27th; is that correct?

A. Yes. That was the day of the incident.

Q. Look it over for a second and show me anywhere in that report where it says he returned that day to cash a fraudulent check.

A. Well, it doesn't say in here, but you have to remember, this report was made the day of the incident, and that affidavit was made a good deal of time later.

Q. That's what I'm asking you, what the story is today? Did the manager tell you that or not?

A. Well, if I want the greatest accuracy, I would refer to the report that was made the day of the incident where everything was fresh. I wasn't having to think back three years ago did "X" happen. I would have to refer to this because like I said, I wrote it within, you know, an hour of when the incident occurred.

Q. Okay. So what's your testimony today? Did the bank manager tell you or not tell you that Mr. Sutherland had cashed a fraudulent check or returned to cash a fraudulent check that day?

A. I can't remember him telling me that day he had done it, and I didn't put it down here. And it's possible that he didn't do it that day, and that was a mistake that I made in my affidavit.

Q. Thank you. Did Mr. Renda tell you that he felt threatened by Mr. Sutherland?

A. No, sir.

Q. Did he tell you that Mr. Sutherland had made any actions at all towards him or threatening to him?

A. No, sir.

Q. And if he did, those would have been in your report; is that correct?

A. Yes, sir.

Q. Why when you went in the bank -- you testified earlier that you pulled your badge out of your fanny pack --

A. No, sir. My badge was on a chain around my neck.

Q. Okay. So you pulled it out after you got into Mr. Renda's office?

A. No, sir. I pulled it out after I left his

office, and I went out to arrest Mr. Sutherland.

Q. Was Mr. Sutherland standing right there by the office?

A. No, sir.

Q. So if Mr. Renda and Mr. Sutherland both testified they were standing there at the doorway, they were wrong?

A. In other words, the office was not directly adjacent to the lobby. You had to walk down a hall -- when you left the lobby, you turned right, and you had to walk down a hallway that would probably be from about here to that door to get to the area where I spoke with the bank manager.

Q. Let me back up a little bit. You testified earlier that when you arrived at the bank manager's off, Mr. Renda was standing outside the office?

A. No, sir. I said he was -- well, he was standing in the lobby, which was outside of the office, but you had to go down to the hall to get to the office.

Q. How far in feet was Mr. Sutherland standing from the entrance to Mr. Renda's office when you arrived? Let's start there.

A. I would say for him to be where he was at and to walk down to the office, he'd probably have to walk, I don't know, about 30 feet maybe.

Q. So if Mr. Renda testified that Mr. Sutherland was standing right there at the office door, right outside where he could be seen, you'd say that was wrong?

A. Well, he could be seen. He was a few feet away, like I said, down there by the lobby.

Q. And if Mr. Sutherland testified to that, he'd be wrong also; right?

A. Yes, sir.

Q. Let me get this straight. You walked out of the office, and as you walked out, you pulled out your badge?

A. No, sir. I pulled my badge out when I entered the lobby.

Q. The lobby of the bank after you left the office?

A. Yes, sir.

Q. Did Mr. Renda point out Mr. Sutherland to you?

A. Yes.

Q. Did he walk outside of his office and point him out, or did he point him out from the office?

A. He pointed him out from the office.

Q. When you approached Mr. Sutherland, you drew your weapon then; is that correct?

A. Yes.

Q. And your testimony then is you said what? When you pulled your weapon, what did you say?

A. I identified myself as a police officer. Then he had his hands in his pockets. I said, "Slowly remove your hands from your pockets." I believe I had to repeat it, and he pulled his hands from his pockets.

Q. So you didn't say, "Ddn't move. Don't move. Don't move"?

A. No, sir.

Q. So if there's testimony to that, that's an erroneous allegation?

A. Yes, sir. I told him slowly remove your hands from your pockets. I can't tell him not to move and then tell him to move.

Q. What type of weapon were you carrying that day?

A. A baby Glock.

Q. I Glock 40 caliber; right?

A. Yes, sir.

Q. Is that the only weapon you carried since you've been a police officer?

A. No, sir.

Q. What was the weapon you carried before that?

A. When I worked uniform, I carried a Smith and

40 caliber is a larger caliber than the nine millimeter; correct?

A. Yes, sir. It travels at a lower velocity.

Q. So it has a greater knock down —

MR. LOVE: Your Honor, I'm going to object to the relevancy at this point.

THE COURT: Overruled.

Q. (By Mr. Spencer) So, after you approached Mr. Sutherland with a gun on him and said take your hands out of the pocket, did he take his hands out of the pocket?

A. Yes. He complied.

Q. You didn't have to physically remove his hands?

A. No, sir, he complied.

Q. Did you at any time grab his hands and try to hand cuff him?

A. No, sir. That was strictly against the training that I had. That's dangerous. I didn't attempt that.

Q. So if Mr. Renda and Mr. Sutherland testified to that, they'd be wrong?

A. Yes.

Q. And then after he was hand cuffed -- did you escort him out through the lobby or —

A. He was hand cuffed in the lobby.

Q. Did you set him down in a chair out there?

A. Somebody else must have sat him down. I don't remember sitting him down.

Q. Who did the hand cuffing?

A. One of the patrol officers. There were two patrol officers in uniform that arrived on the scene. I didn't know them, but one of the two of them did.

Q. Did you ever see a weapon on Mr. Sutherland that day?

A. No, sir.

Q. Did he make any threatening actions towards you?

A. No, sir.

Q. Let me stop for a second. On that day at that time, what do you feel was the basis of your authority to make an arrest?

A. I was a sworn police officer, and I had probable cause to believe that Mr. Sutherland had committed a felony.

Q. And what do you say that probable cause was -- what was that probable cause?

A. The information -- the evidence that the bank manager had, the information that he gave me at the time, and the fact that he pointed out Mr. Sutherland as

the defendant.

Q. What tapes did you review after the fact?

A. These were tapes that, you know when you go to the bank you see the cameras over the teller's desks or if you go to the drive through, the cameras that you see at the drive-through, these were some tapes that were taken from those cameras that had recorded transactions that people had done with the tellers.

Q. Was that transactions that occurred that day to your understanding?

A. No, sir. He was going back looking at the dates of one of the checks I think. He had a tape from the date that one of those checks was dated trying to see if he could see that transaction that had taken place where that check had been cashed.

Q. When you arrested Mr. Sutherland, did you charge him with anything?

A. Yes, sir.

Q. What did you charge him with?

A. Well, initially, I charged with him negotiating a forged instrument, but I was instructed to change that charge.

Q. Did you inform Mr. Sutherland —

A. Excuse me, sir.

Q. At the time that he was arrested, did you

inform Mr. Sutherland he was charged?

A. I told him he was under arrest. I didn't say what for.

Q. Was Mr. Sutherland ever booked?

A. No, sir, not to my knowledge.

Q. Who told you to change that charge?

A. The detective I spoke with.

Q. That was Detective Grayson?

A. Yes.

Q. And what time -- when did he tell you to change it?

A. I'd say this was probably 30 minutes to 40 minutes or 45 minutes after the arrest.

Q. Was that after Mr. Sutherland had been taken down to the station?

A. Yes, sir. The transport vehicle had left. The marked unit with the prisoner in it had left.

Q. Your understanding on the use of force, is that what force a reasonable person would use?

A. Yes, sir.

Q. What is your understanding of what the term "reasonable person" means?

MR. LOVE: Objection. Calls for a legal conclusion.

THE COURT: He's asking his understanding of it.

Overruled.

A. A reasonable person I guess would be just the average citizen or the average police officer with the training that he's received.

Q. It's your testimony here today that you're authorized to pull your weapon for all felony arrests?

A. Yes.

Q. Regardless of the circumstances?

A. No, sir. I wouldn't say regardless of all circumstances, but under these circumstances, yes.

Q. Well, that's --

A. There's always an exception.

Q. You said the reason you pulled your weapon, it was a felony arrest?

A. Yes.

Q. So is your testimony on all felony arrests?

A. Yes, sir. It is my standard approach to pull my weapon on all felony arrests, yes, sir.

Q. Just a few more questions. One second, please.

When did you retire from the police force?

A. I believe July of '98 -- excuse me, July of '97.

Q. Less than two weeks after this incident; is that correct?

A. If this is in January, yeah, it would have been soon after, yes, sir.

Q. Why didn't you wait on backup before going into the bank?

A. Why did I not wait on backup?

Q. Yes.

A. Well, I didn't think it was necessary. I was in plain clothes, so I wasn't really identified as a police officer by anybody inside, so I thought under those circumstances it was safe for me to go in.

Q. You were in 346; correct?

A. Yes.

Q. Was 342 right there behind you?

A. No, sir, they weren't right behind me.

Q. What about 350?

A. If they had been right behind me, they would have gone in with me. To my knowledge none of the vehicles were right behind me.

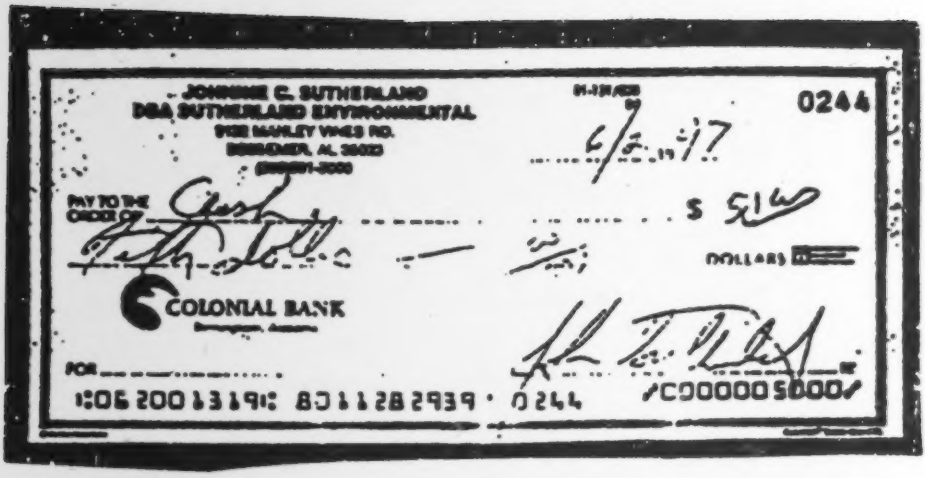
Q. Were there any UAB police cars there on the scene when you arrived?

A. I didn't see a UAB police car, no, sir.

Q. How soon after you got there did other policemen arrive?

A. I'd say probably a couple of minutes.

Q. About how many minutes do you think?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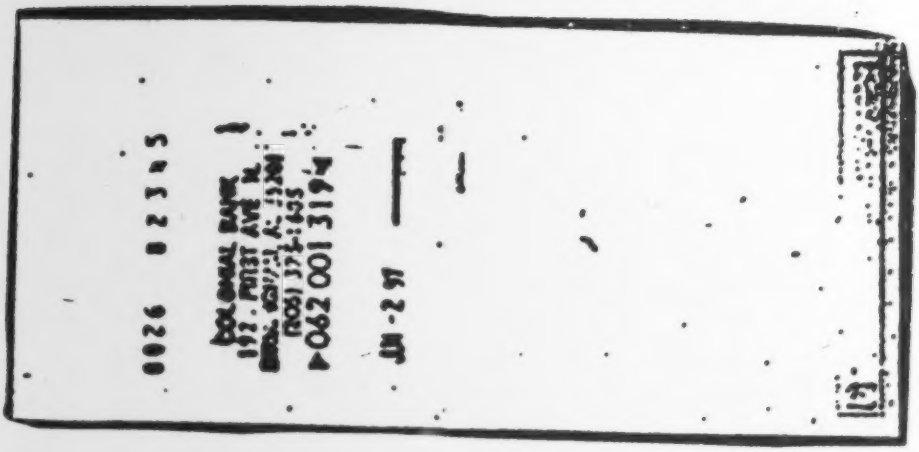
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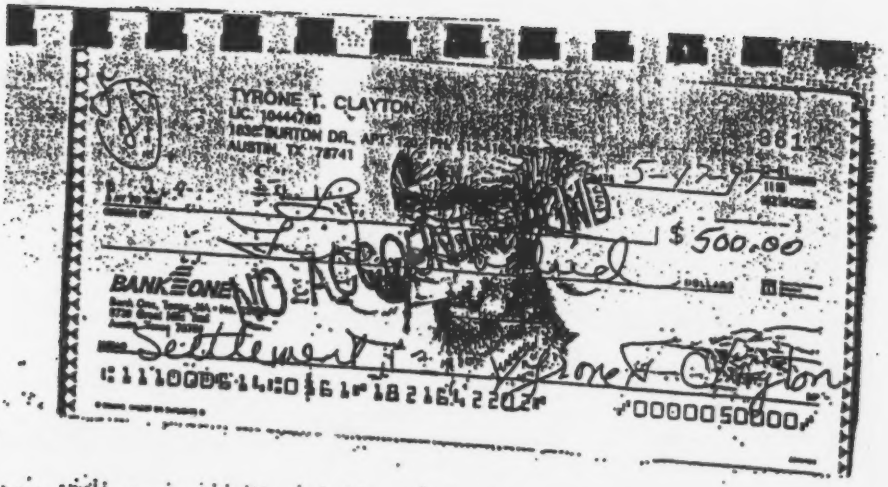

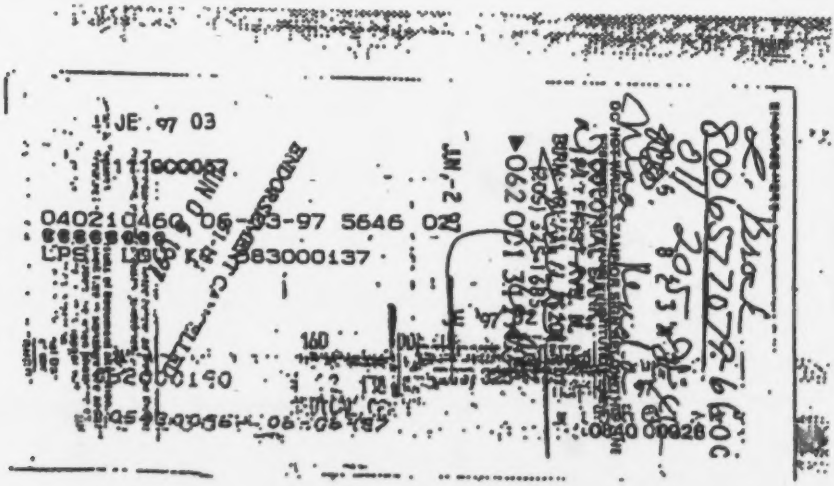

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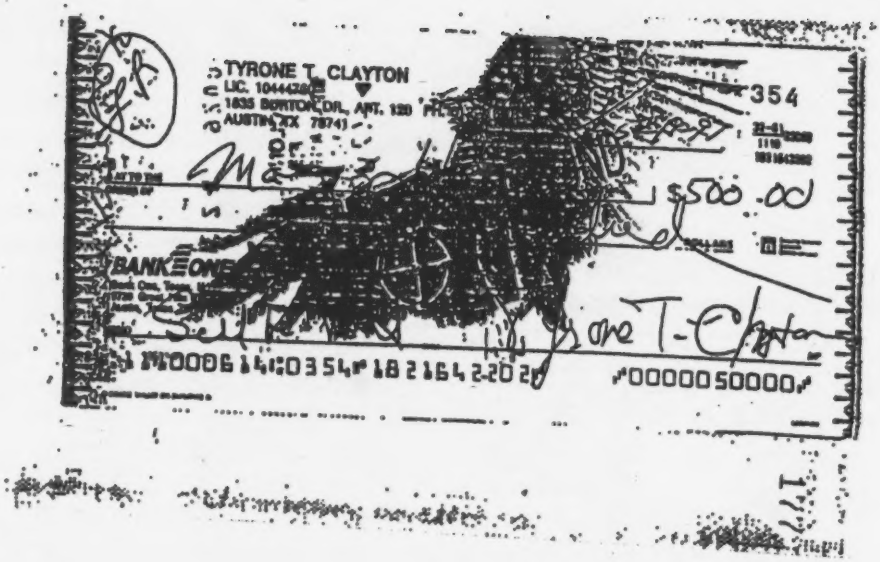
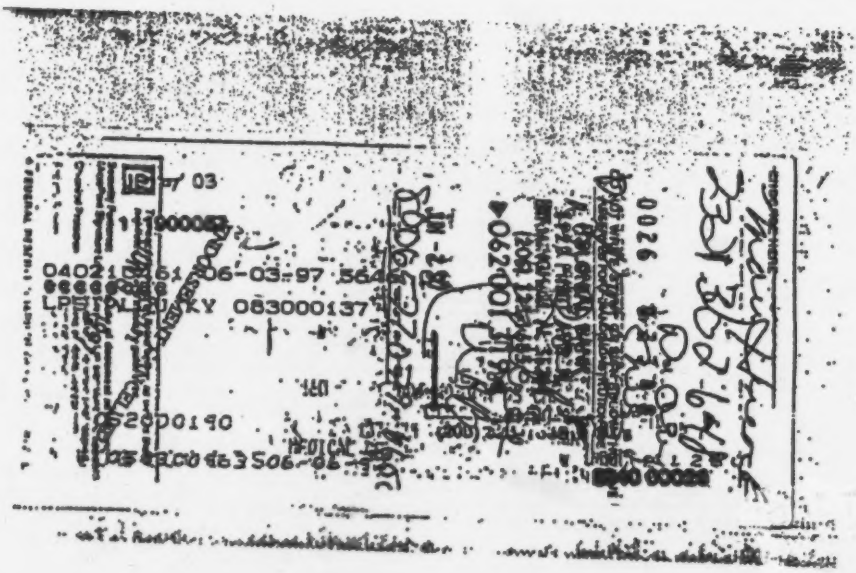

TYRONE T. CLAYTON
354
$500.00
BANK ONE



BIRMINGHAM POLICE
INCIDENT/OFFENSE REPORT

123

PAGE 1 OF 1

1 INCIDENT
4 OFFENSE
2, 3 SUPPLEMENT
4, 5 INTELLIGENCE

0110201000	02/27/97 1600 hrs	South	346

Mark Kenda — 1801 5th Ave. So. B'ham. Al. 35233 — 3257793

Colonial Bank — 1801 5th Ave. S. B'ham. Al. 35233 — 325-1773

Negotiating a Worthless Instrument

5312

#13

02 06 97 — 1800

DEFENDANT'S EXHIBIT 7 Kenda

INCIDENT/OFFENSE REPORT CONT'D

06/27/97	1600	9717016178197917									

Sutherland, Johnnie Charles								07/14/49		48	
9123 Mealey Vines Rd.	Bessemer	Al.	35023	6'05	255	Bro	Bro	Light			

01	Norris, Melanie (Tellis)	2800 Emerald Ave.	Hueytown		491-2996						
02	S-S-76										
03											
04											

On listed date the suspect engaged in three transactions at the same time at Colonial Bank at 1801 5th Ave. So. Three checks were cashed. One check was the suspects check drawn on his account at Colonial Bank. The amount was $50.00. The other two checks were drawn on the account of Tyrone T. Clayton. The checks were issued by Bank 1 One in Austin, Texas. Each of the two checks was for $500.00 and were signed "Tyrone T. Clayton. Both checks were marked as though the manager had approved them being cashed, but the approval had not been given. The 2 checks on Bank 1 One were returned, stamped "No Account Found." According to bank records, the transactions involving the cashing of the 3 checks began at 10:00 and concluded at 1001.

CONTINUED ON SUPPLEMENT ☐ Y ☐ N

I hereby affirm that I have read this report and that all information given by me is correct to the best of my knowledge. I will assume full responsibility for swearing this against it any claims properly or missing persons having reported voluntary rights to assist in the prosecution of this offense.

SIGNATURE Mark A. Kendro

CASE STATUS: ☐ 1. PENDING ☐ 2. INACTIVE ☐ 3. CLOSED

☐ 1. CLEARED BY ARREST (ADULT) ☐ 2. CLEARED BY ARREST (JUVE.) ☐ 3. UNFOUNDED

EXCEPTIONAL CLEARANCE: ☐ 4.1 DEATH OF OFFENDER ☐ 4.2 OTHER PROSECUTION ☐ 4.3 EXTRADITION DENIED ☐ 4.4 LACK OF PROSECUTION ☐ 4.5 JUVENILE NO DISPOSITION ☐ 4.6 VICTIM DIED

REPORTING OFFICER: M. Wooten 1/17/19

ARRESTING OFFICER

SUPERVISOR APPROVAL

DATA ENTRY CLERK

☐ 1. DRUGS RELATED ☐ 2. COMPUTER RELATED ☐ 3. GANG RELATED

DATE AND TIME OF DATA ENTRY